91-361

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

VICKI LYNNE HOSKINSON, et al.,

Appellants,

vs.

STATE OF CALIFORNIA, et al.,

Appellees.

Petition For Writ Of Certiorari To The Arizona Court Of Appeals, Division Two

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the doctrine of "purposeful availment" developed under the Due Process Clause of the Fourteenth Amendment by this Court's prior decisions, preclude the assertion of personal jurisdiction over a defendant whose intentional performance of a reckless and wanton act in an adjoining state has proximately caused the molestation and death of a child residing in the forum when:

(a) the injury in the forum state was the reasonably expected consequence of the defendants' misconduct;

(b) the forum state has strong and legitimate interests in providing a remedy for the victim's family; and,

(c) considerations of fair play and convenience overwhelmingly favor trial in the forum?

2. If the existing decisions preclude jurisdiction under the Fourteenth Amendment should those decisions be reconsidered?

3. Does the protection of individual liberty interests of "persons" under the Fourteenth Amendment Due Process Clause extend to the State of California in its governmental capacity or should the definition of "persons" so protected be more logically construed to protect only individuals seeking protection against wrongful state action?

LIST OF PARTIES

The parties to the proceedings below were, and the parties to this Petition for Certiorari are:

PETITIONERS:
Vicki Lynne HOSKINSON Through the Personal Representative of Her Estate, Robert FLEMING; Deborah Jane Carlson, Individually and as Surviving Parent of Vicki Lynne Hoskinson and George Glenn Carlson, Jr., Husband and Wife; Stephanie Dawn Hoskinson by Her Next Friend and Mother, Deborah Jane Carlson; Carie Lynn Carlson by Her Next Friend and Father, George Glenn Carlson; Brian William Carlson by His Next Friends and Parents, Deborah Jane Carlson and George Glenn Carlson, Jr., and Rodney Paul Hoskinson, Individually and as Surviving Parent of Vicki Lynne Hoskinson, Deceased, **(all were Plaintiffs/Appellants below)**

RESPONDENTS:
STATE OF CALIFORNIA; California Department of Corrections, a State Agency; California Board of Prison Terms; Robert McLean, Individually and in His Official Capacity, and Jane Doe McLean, Husband and Wife; Members of the California Board of Prison Terms, Individually and in Their Official Capacities; John Atwood and Alice Atwood, Husband and Wife; **(all were Defendants/Appellees below).**

PARTY BELOW WHO IS NOT A PARTY TO THIS PROCEEDING:
Frank Jarvis Atwood, **(a defendant in the trial court).**

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The opinion of the Arizona Supreme Court denying review is not yet reported in the official reporters. It is reported in Westlaw as Hoskinson v. State of Cal. ___ P.2d ___, 1991 WL 128407 (Ariz.), as 1991 Ariz. LEXIS 52 and is reprinted in the Appendix at pages 18-22. The opinion of the Arizona Court of Appeals in regard to which certiorari is sought here is not yet reported in the official reporters. It is reported in Westlaw as Hoskinson Through Fleming v. State of Cal. ___ P.2d ___, 1990 WL 202765 (Ariz.App.), 1991 Ariz.App. LEXIS 401 and is reprinted in the Appendix at pages 1-17. The minute entry of Judge Carruth in the Arizona Superior Court is not reported and is reprinted in the Appendix at pages 23-28.

JURISDICTION

The opinion of the Arizona Court of Appeals dated December 13, 1990 is contained in the Appendix at pages 1-17 and is the order sought to be reviewed here. A petition for review under Arizona procedure was timely filed on December 21, 1990. The Arizona Supreme Court denied review on July 9, 1991 by written order contained in the Appendix at pages 18-22. Petitioners believe that jurisdiction is conferred on this Court by Title 28 U.S.C. § 1257 which provides in pertinent part:

> *State courts; appeal; certiorari*
>
> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme

> Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

The federal question raised by this case under the Fourteenth Amendment to the Constitution of the United States was specifically set forth in the initial motions to dismiss and have been the basis upon which each of the courts below have ruled.

CONSTITUTION AND STATUTES INVOLVED

The Fourteenth Amendment to the Constitution of the United States, Section 1, provides:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The California Government Code provides in Section 845.8:

> Parole or release of prisoner; escape of prisoners
>
> Neither a public entity nor a public employee is liable for:
>
> (a) Any injury resulting from determining whether to parole or release a prisoner or from determining the terms and conditions of his parole or release or from determining whether to revoke his parole or release.
>
> (b) Any injury caused by:
>
> (1) An escaping or escaped prisoner;
>
> (2) An escaping or escaped arrested person; or
>
> (3) A person resisting arrest.

The California Penal Code provides in Section 3059:

> Leaving state without permission; escape
>
> If any paroled prisoner shall leave the state without permission of the Board of Prison Terms, he shall be held as an escaped prisoner and arrested as such.

STATEMENT OF THE CASE

This case involves the interpretation of the doctrines developed by this Court following its decision in *International Shoe Co. v. State of Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945) and in particular, the doctrine of "purposeful availment" that stems from this Court's decision in *Hanson v. Denckla*, 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958).

The litigation arises out of the kidnapping, molestation and murder of eight-year-old Vicki Lynne Hoskinson of Tucson, Arizona, who died there on September 17, 1984 at the hands of a California parolee named Frank Jarvis Atwood who was released from prison following compeletion of his determinate sentence. The proximate cause of Vicki Lynne Hoskinson's death is alleged to be the intentional failure of the defendants, both individual and governmental, to exercise their specific duty to control the actions of Frank Jarvis Atwood who they knew to be a vicious, non-repentant child molester who had been administratively determined to be likely to cause harm to children if left uncontrolled. The State of California had, upon that determination, put Atwood into a parole classification known as "controls emphasis" which was designed to protect the public from the danger he posed to children. That protection was to be accomplished by various means described in the California Parole Procedures Manual. In addition, plaintiffs allege a range of legal obligations to control arising from the common law and the California Penal Code §3059, *supra*, p. 3. Instead of complying with those obligations, however, the defendants did virtually nothing. Frank Atwood was allowed to roam free and uncontrolled across the southwestern United States in clear violation of those obligations. On several occasions he found his way to Tucson, Arizona where he finally abducted, molested and murdered Vicki Lynne Hoskinson. The facts are spelled out in more detail in the dissenting opinion of Judge Hathaway in the Court below. (App. 10-17)[1]

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[1] Throughout this petition the citation to the Appendix will be "App. ___".

This suit was brought by the family of Vicki Lynne Hoskinson in Tucson. It was dismissed as to respondents here for want of personal jurisdiction under the Fourteenth Amendment to the Constitution of the United States because there was "no showing of any kind that the defendants' conduct was in any way purposefully directed toward Arizona." (App. 6) Plaintiffs below, petitioners here, did not allege that the defendants sent Frank Atwood to Tucson. Petitioners *do* allege, and the court below assumed for purposes of its decision, that the defendants "engaged in conduct which they should reasonably have expected would cause an effect in this state." (App. p.4) Notwithstanding that conclusion, the courts below held that personal jurisdiction could not be asserted consistently with the Fourteenth Amendment doctrine established by this Court.[2] The case arose in the following fashion.

After Frank Jarvis Atwood was arrested and charged, petitioners filed suit in the Arizona state courts against various individual defendants in their personal capacity and the State of California in its governmental capacity. The defendants removed the case to the United States District Court where, after considerable litigation, it was remanded as improvidently removed. In the state court

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[2] While the court below reached this opinion by reference to opinions of the Arizona Supreme Court as well as opinions of this Court, it is clear that both courts rely upon the federal constitutional doctrine established by this court in *International Shoe Co. v. State of Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945) and its progeny. *See, Batton v. Tennessee Farmers Mut. Ins. Co.*, 153 Ariz. 268, 269, 736 P.2d 2, 3 (1987).

the case proceeded to discovery on the jurisdictional issues raised by the defendants' motions to dismiss. Following the conviction of Frank Jarvis Atwood for the kidnapping and murder of Vicki Lynne Hoskinson, the trial court entered partial summary judgment against him on the question of liability. *See*, Ariz. Rev. Stat. §13-807 (Supp. 1989).

Thereafter, depositions of the other defendants were taken and extensive document production occurred. Upon the completion of discovery plaintiff filed a sixty-three paragraph Statement of Facts under Uniform Rule IV(f) summarizing the discovery.[3] The trial court did not hold an evidentiary hearing but on the pleadings and other papers found that the remaining defendants had not "purposefully availed" themselves of the "benefits of Arizona law" and on that basis dismissed for want of personal jurisdiction under the Fourteenth Amendment. On appeal the Arizona Court of Appeals affirmed by a vote of 2-1. On Petition for Review the Arizona Supreme Court denied review by a vote of 3-2.

The case is brought to this Court because the court below felt compelled by this Court's decisions to uphold dismissal of the suit brought by the parents and siblings of Vicki Lynne Hoskinson in the county of her residence and death on the ground that the individual defendants did not "purposefully" direct their reckless and wanton

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[3] Under Arizona law, those facts and all inferences reasonably drawn in petitioners' favor from them, comprise the factual record on appeal. *Corbin v. Challenge, Inc.*, 151 Ariz. 20, 23, 725 P.2d 727, 730 (App. 1986) is most often cited for this proposition.

conduct specifically toward Arizona. The court reached that conclusion even though those defendants, respondents here, "should have foreseen or did foresee that Atwood would travel to Arizona and sexually assault a child here" (App. 6), if they did not assert control over his actions. That disturbing result was not reached without considerable discomfort on the part of the judges at all three levels of the Arizona judicial system.

The trial judge expressed his view that he was bound by this Court's decisions requiring that the defendants purposefully "avail" themselves of the "benefits" of the forum state. He also concluded that the doctrine of jurisdiction by necessity was not applicable and that the State of California is a "person" entitled to claim the individual liberty protections of the Fourteenth Amendment. The trial judge decided a number of other issues which were not addressed in the subsequent appellate proceedings and, therefore, are not therefore before this Court. (App. 23)

The Arizona Court of Appeals split 2-1, with the dissenting judge writing an impassioned and factually detailed attack upon the doctrines that were deemed by the majority to compel such a seemingly spurious result. *Hoskinson v. State of California*, ___ P.2d ___ (1991). (App. 1) The majority, while expressing some disquietude, nevertheless held that expected harm in a foreseeable forum is not a sufficient jurisdictional predicate under this Court's decisions unless the conduct which is the proximate cause of the harm was "directed" to the forum. The court observed, however, that the contrary rule "[p]erhaps . . . should be the law. So far, it is not." (App. 9, footnote 4) The Court of Appeals also affirmed the trial

court's conclusion that the State of California was a "person" entitled to claim the individual liberty protections of the Fourteenth Amendment, that the doctrine of jurisdiction by necessity was not applicable and that "general jurisdiction" could not be asserted.

The Arizona Supreme Court, in an unusual split decision, denied review by a vote of 3 to 2. *Hoskinson v. State of California*, ___ P.2d ___ (1991). App.18 No reasons were given for the majority's view, but the two dissenting justices specifically suggested that this Court review the decisions that the majority felt dictated the dismissal of the case. (App. 20) Those justices concluded that application of this Court's decisions in the circumstances of this case resulted in a denial of due process to the plaintiffs who realistically have no other functional or convenient forum open to them. *See*, Cal.Govt.Code § 845.8, *supra* p. 3; *and see*, e.g. *Martinez v. State*, 149 Cal.Rptr. 519, 85 C.A.3d 430, affirmed 100 S.Ct. 553, rehearing denied 100 S.Ct. 1285, 444 U.S. 277, 62 L.Ed.2d 481, rehearing denied 100 S.Ct. 1285, 445 U.S. 920, 63 L.Ed.2d 606 (1978). The three decisions in the Arizona courts are collected in the Appendix. Because review in the Arizona Supreme Court is discretionary, the petition for certiorari is sought in regard to the opinion of the Arizona Court of Appeals. U.S. Sup. Ct. Rule 13.1.

REASONS FOR GRANTING THE WRIT

I.

The Court of Appeals' conclusion that reckless and wanton misconduct, intentionally undertaken with full awareness of the possible consequences in an adjoining state is an insufficient preliminary predicate for the exercise of personal jurisdiction, is inconsistent with this Court's prior decisions and with the decisions of other courts.

The result reached by the court below is an extreme example of the conflicting results in the lower courts over the years regarding the application of the rule that stems from Justice Warren's opinion in *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S.Ct. 1228, 1239, 2 L.Ed.2d 1283 (1958), that personal jurisdiction must be founded upon "some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." See, *infra*, pp. 18-21.

The question in this case is whether that "act" must in all cases be one directly intended to cause an effect in the forum state in contrast to being one which could be reasonably expected to cause such an effect. If subjectively determined direct intention is in every case required, then the court below was correct. If objectively reasonable expectation of an effect in the forum is a sufficient predicate for more searching inquiry into fundamental fairness, then the court below is wrong.

Until recently, this court appeared to be moving toward the development of an objective test. In *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 105 S.Ct. 2174, 85

L.Ed.2d 528 (1985), the Court canvassed the objectively determinable factors that would make unreasonable the assertion of personal jurisdiction. In addition, however, the Court appeared to recognize that the subjective intention to impact the forum state was almost always sufficient, in and of itself, and it cast a heavy burden upon defendants in such situations to demonstrate a high level of actual unfairness. Thus following the opinion in *Burger King, supra,* the objective purposeful availment test, designed to protect against the assertion of jurisdiction on the basis of "random, fortuitous, or attenuated contacts, or of the unilateral activity of another party or third person." (471 U.S. 462 at 474, 105 S.Ct. 2174 at 2183) appeared to be the necessary predicate for jurisdiction that justified inquiry into the overall fairness and reasonableness of the assertion of jurisdiction. On the other hand, subjective purposeful direction became a nearly always sufficient condition for the exercise of jurisdiction. In *Asahi Metal Industry Company, Ltd. v. Superior Court,* 480 U.S. 102, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1987), however, this Court split deeply on what kind of "purposefulness" constituted a necessary, as opposed to sufficient, predicate for the assertion of jurisdiction. In the years following *Asahi* the lower courts, both state and federal, have reflected the conflict among the Justices of this Court and their rulings have evidenced considerable doctrinal disarray. *See, infra* pp. 18-21. The problems have not been limited to products liability actions or international problems such as those in *Asahi,* but rather have been applied across the range of cases in which interstate adjudicatory jurisdiction may be asserted.

This case is an ideal case for exploring that doctrinal problem and resolving the conflict that exists in the decisions. The meaning of "purposeful availment" has been the focal point of this litigation from the outset. All parties have been fully aware of its critical importance to this case throughout the substantial discovery and through briefing that has been undertaken. The appellate process has narrowed the issues in the case. The court below has made a tightly focused and clear predicate factual assumption, fully supported by the record, and precisely directed to the question left unanswered and confused by the three opinions in *Asahi*.[4] The judges below have divided on the point and some have specifically asked for this Court's assistance. (App. 20)

As the *Asahi* opinions reveal, there is no clearly established meaning to the concept of purposeful availment. On the one hand, Justice O'Conner's plurality opinion appears to adopt a view that requires a showing of subjectively intentional forum-directed conduct. Justice Brennan's plurality opinion appears to focus upon the defendant's objective awareness of the possibility that its conduct might have impact within the forum. Justice Stevens' separate opinion would adopt a balancing test that requires "a constitutional determination that is affected by the volume, the value, and the hazardous

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[4] While it has been suggested that *Asahi* does not apply in the domestic context or in the non-product liability context, it has not been so understood by the lower courts. Generally, the courts have taken *Asahi* to be this Court's latest word on the meaning of purposeful availment.

character of the components." (480 U.S. 102, 122, 107 S.Ct. 1026, 1038).

As might be expected, each opinion has its analogue in the lower state and federal courts both before and after *Asahi* as we will show in the following section of this petition. Petitioners assert that this state of doctrinal disorder is unnecessary and indeed inconsistent with the existing doctrine developed by a majority of this Court. This Court in *World-Wide Volkswagen Corp. v. Woodsen*, 444 U.S. 286, 100 S.Ct. 559, 62 L.Ed 490 (1980) made the point that the role of the Due Process Clause in the personal jurisdiction context was simply to allow informed decision making at the level of primary conduct[5] and it characterized the due process requirement as the existence of reasonable anticipation of litigation in the impacted forum. Several terms later in *Burger King Corp. v. Rudzewicz, supra*, this Court noted that the essence of "purposeful availment" is that the defendant's connection with the forum not be the result of "random, fortuitous, or attenuated contacts, or of the unilateral activity of another party or third person."

Objective tests such as suggested in *Burger King* and *Volkswagen* have served well in other areas of procedural

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[5] "The Due Process Clause, by ensuring the 'orderly administration of the laws,' *International Shoe Co. v. Washington*, 326 U.S., at 319, 66 S.Ct., at 159, gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." (444 U.S. 286, 296, 100 S.Ct. 559, 567).

law where subjective inquiry has been found unnecessarily complicated and indeterminate. *See*, e.g.: *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982), *Malley v. Briggs*, 475 U.S. 335, 340, 106 S.Ct. 1092, 1095, 89 L.Ed.2d 271 (1986). Moreover, an objective standard functions much more efficiently in the special context in which jurisdictional decisions are made. We have noted below that the initial choice of a forum in interstate cases is often made with very limited information and under the pressure of statutes of limitation. Under those circumstances, "threshold" tests (such as purposeful availment has become) should as a matter of simple efficiency look to objective factors.

In the case at bar, the court below assumed that "the defendants should have foreseen or did foresee that Atwood would travel to Arizona and sexually assault a child here. . . . " (App.6) On that assumption the defendants, under an objective standard, anticipated or should have reasonably anticipated litigation here arising out of their failure to control Frank Jarvis Atwood and they could have regulated their primary conduct in a way that would have minimized the risk of such an eventuality. Indeed, the unambiguous common law, statutory and administrative regulatory obligation was to do exactly that for the precise purpose of protecting the public from Frank Jarvis Atwood and the danger he so clearly posed to children in his path. At a minimum, John McLean had a statutory obligation to arrest Frank Atwood when he became aware of his interstate travel. Cal. Penal Code § 3059, *supra*, p. 3. Atwood was in McLean's office and McLean knew the statutorily relevant facts when he intentionally chose to not arrest Frank Jarvis Atwood. His

was not an act of mere negligence – it was a direct violation of his statutory duty to arrest. But for that failure, the murder would never have occurred.[6] The defendants cannot claim surprise at their charge's arrival in Arizona under the circumstances and the due process predicate established by this Court in the *Volkswagen* case was therefore satisfied. By requiring subjective proof of "purposeful direction" however, the court below posed a virtually insurmountable threshold standard, particularly in the tort context. It did so recognizing that its view of the law excluded from interstate personal jurisdiction all non-intentional torts, even those based upon reckless and wanton misconduct as in the case at bar. (App. 9, footnote 4) It expressed the view that while that result might be unsound as a matter of law, this Court's decisions seemed to the majority to compel it.

Petitioners have continuously asserted that a reckless or wanton act intentionally undertaken with full awareness of the potential for disastrous consequences in an adjoining state is a sufficient predicate for inquiry into the interests of the forum state and the factors relating to reasonableness and fairness. In the interstate pollution context this Court has summarily affirmed personal jurisdiction in the place of the injury. *City of Milwaukee v. Illinois and Michigan*, 451 U.S. 304, 311, 101 S.Ct. 1784, 1790, 68 L.Ed.2d 114, at note 5 (1981). This Court has also indicated its acceptance of the highly similar principle of reasonable expectations set forth in Section 37 of the

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[6] In the court below, the dissenting judge notes that were McLean an Arizona officer, his failure would be criminal. (App. 15)

Restatement of Conflict of Laws. *Calder v. Jones*, 465 U.S. 783, 104 S.Ct. 1482, 79 L.Ed.2d 804 (1984). For good or ill, we live in a time when most human activity has an interstate, if not international dimension. A rule that removes accountability from a tortfeasor who knowingly and recklessly lets go a pernicious force, be it chemical, biological or human is one that requires strong justification. When that justification is wholly based upon the simple fact that the predictable consequence of the misconduct crosses a state line the rule deserves a careful and studied review by this Court.

Because the court below held that the decisions in *World-Wide Volkswagen Corp. v. Woodsen*, 444 U.S. 286, 100 S.Ct. 559, 62 L.Ed 490 (1980) and *Asahi Metal Industry Company, Ltd. v. Superior Court*, 480 U.S. 102, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1987) required a predicate showing that the defendants purposefully "directed" Frank Atwood to Arizona the question of the fairness and reasonableness of jurisdiction were not evaluated.

Had the questions of fundamental fairness and reasonableness, the convenience of the forum and the substantive interests of the forum state been evaluated, as *World-Wide Volkswagen, supra*, allows, it is clear the assertion of jurisdiction would be upheld. Most of the witnesses regarding the murder and its subsequent harm are, of course, located in Arizona. The witnesses regarding fault are either defendants or employees of defendants and thus subject to process in the Arizona courts. Frank Jarvis Atwood is incarcerated in Arizona and the burden of producing him for trial in California is obviously great. The interests of the state of Arizona in keeping its courts open for redress of injuries within its borders is manifest.

See, e.g. Kenyon v. Hammer, 142 Ariz. 69, 688 P.2d 961 (1984). Indeed, the notion of suit against a tortfeasor at the situs of the tort is so commonsensical and the preference for trial in the place of the injury so traditional, it is hard to imagine rejection of jurisdiction on grounds of fundamental fairness on these facts. Indeed, the defendants have never suggested in the proceedings below that such unfairness exists. The dissenting justices in the Arizona Supreme Court agreed. (App. 20)

Finally, the Arizona forum is the only one in which all defendants can be sued in a single proceeding. What is at stake here for defendants is not convenience or fundamental fairness but rather the use of procedural doctrine to avoid the merits and inquiry into "traditional notions of fair play and substantial justice."[7] The governmental defendants know that their victory in the California courts is certain under its immunity law. Cal.Govt.Code. § 845.8, *supra,* p. 3. The individual defendants know that without the most blameworthy of the joint tortfeasors before the jury their chance of victory is

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[7] We refer of course to the factors set forth by this Court in *World-Wide Volkswagen Corp. v. Woodsen,* 444 U.S. 286, 100 S.Ct. 559, 62 L.Ed 490 (1980). The circuit courts have expanded upon those ideas and it is common to see a list such as has been developed in the 9th Circuit which looks at seven factors: the extent of purposeful interjection, the burden on the defendant to defend the suit in the chosen forum, the extent of conflict with the sovereignty of the defendant's state, the forum state's interest in the dispute, the most efficient forum for judicial resolution of the dispute, the importance of the chosen forum to the plaintiff's interest in convenient and effective relief, and the existence of an alternative forum. *See, e.g., F.D.I.C. v. British-American Ins. Co.,* 828 F.2d 1439, 1442 (9th Cir. 1987).

greatly enhanced. The effect of the lower court's decision is to award victory on the merits without reaching the merits. It does that by reference to a perceived duty to follow a version of the purposeful availment rule that, with all respect, we submit has never commanded a majority of this Court and under the circumstances certainly should not do so in this case.

It is impossible to fully evaluate the impact of the existing discord in doctrine, but even a cursory review of the current appellate cases must leave one with the strong impression that jurisdictional overreaching is not the problem. As the dissenting justices in the Arizona Supreme Court noted, the highly restrictive impact of the subjective "purposeful availment" test may in fact deny plaintiffs their right to a forum and raise another set of due process problems involving access to courts. (App. 20) That is particularly significant here because the petitioners have no other forum open to them in which all defendants can be sued. Petitioners urge the Court to grant the writ to make clear the role of the due process clause in this context and to remand this case for a considered inquiry into the factors relating to fairness and convenience that are of the essence in jurisdictional controversies.

II.

If the existing doctrine established by this Court precludes the assertion of jurisdiction here, that doctrine should be reconsidered.

If, on the other hand, there is a constitutionally mandated jurisdictional predicate called "purposeful availment" that means "intentional direction," this case presents this Court with the option of giving specific content to that requirement or abandoning it altogether.

In the following material, petitioners will refer to several decisions of United States District Courts. We are aware of the fact that such references normally are not of substantial interest in the certiorari practice. The jurisdictional problem in this case, however, is a problem that is predominately litigated in the trial courts and left there because the expense and delay involved in appellate litigation often forecloses review. Published opinions of district courts may therefore be of especial interest here and accordingly we have on occasion pointed to them as data in support of the practical effects of the doctrinal conflicts we will describe.

This Court's decision in *Asahi Metal Industry Company, Ltd. v. Superior Court*, 480 U.S. 102, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1987) introduced no new confusion to this narrow body of law. Rather, it reflected the existing confusion and through that reflection exacerbated it. For example, some cases say that purposeful availment or direction is the ***"sine qua non"*** of in personam jurisdiction. *See, e.g. Theunissen v. Matthews*, 935 F.2d 1514, ___ (6th Cir. 1991). Thus, the failure to demonstrate purposeful availment in the subjective sense described in Justice

O'Conner's opinion will result in a rejection of personal jurisdiction without further inquiry. That is what happened in this case. At the same time, many cases make a finding of purposeful availment presumptive establishment of personal jurisdiction, *see, e.g Simmons Oil Corp. v. Holly Corp.*, 244 Mont. 75, 796 P.2d 189, 195 (1990), thus placing a heavy burden upon the defendant to demonstrate unreasonableness. *See, e.g., Sher v. Johnson*, 911 F.2d 1357, 1363 (9th Cir. 1990). The combined effect of those two lines of cases is to compress the doctrines of personal jurisdiction established after the decision in *International Shoe Co. v. State of Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945) into a single test that looks to the defendant's state of mind and seeks to determine the purposefulness of the forum contact generated by the defendant. Indeed, several courts have recently referred to the *Shoe* doctrine as the "purposeful availment/minimum contacts" doctrine. *See, e.g. Fidelity State Bank and Trust Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, ___ F.Supp ___, 1991 WL 116738, (p. 4, slip opinion) (D.Kan. 1991); *Paine Webber, Inc. v. Westgate Group, Inc.*, 748 F.Supp.115, 121 note 4 (S.D.N.Y. 1990); *Hughes v. Cabanas del Caribe Hotel*, 744 F.Supp. 788, 795 (E.D.Mich. 1990).

Another line of cases focusses upon objectively established "reasonable anticipation" language adopted in Justice White's opinion for the Court in *World-Wide Volkswagen Corp. v. Woodsen*, 444 U.S. 286, 100 S.Ct. 559, 62 L.Ed 490 (1980). Those cases reflect a view that more comfortably fits into Justice Brennan's *Asahi* opinion which focusses upon the defendant's objective awareness of possible contact with the forum, which in turns provides "fair warning" of the potential for suit arising out

of potential contact in the forum. *See, e.g., Farmers Ins. Exchange v. Portage La Prairie Mut. Ins. Co.*, 907 F.2d 911, 912 (9th Cir. 1990); *English & Smith v. Metzger*, 901 F.2d 36 (4th Cir. 1990); compare, § 37 Restatement, Conflict of Laws 2d, comment a. Another set of cases adopts a balancing test akin to that proposed by Mr. Justice Stevens. *See, e.g., Waffenschmidt v. MacKay*, 763 F.2d 711, 723 (5th Cir. 1985) [weighing (1) the existence and degree of purposefulness with which the effect in that forum was created; (2) whether the defendant has other substantial contacts with the forum unrelated to the suit; and (3) the substantiality of the effect itself to determine jurisdiction]. *See also, O'Neil v. Picillo*, 682 F.Supp. 706 (D.R.I. 1988). Another case considers dangerousness in determining the strictness with which purposefulness will be weighed. *Lichon v. Aceto Chemical Company, Ltd.*, 182 Ill.App.3d 672, 538 N.E.2d 613 (1989). Finally, one recent case entirely rejects purposeful availment in the tort context. *McAleer v. Smith*, 715 F.Supp. 1153, 1157 (D.R.I. 1989). *And see, Bridge v. Invest America, Inc.*, 748 F.Supp. 948, 954 (D.R.I. 1990) [purposeful availment applies only to contract actions]. Some courts mix everything up and suggest that purposeful availment is a sufficient condition for the exercise of jurisdiction but it is not a necessary one. So long as jurisdiction is "reasonable" under the circumstances, jurisdiction can be found, even when purposeful availment is lacking. *Simmons Oil Corp. v. Holly Corp., supra.* Recent Ninth Circuit cases focus inquiry upon whether the defendant's conduct "allowed" the forum contact, a standard that would seem to allow jurisdiction in the case at bar. *Roth v. Marquez*, ___ F.2d ___, 1991 WL 148316 (9th Cir. 1991).

Many scholars have also noted the doctrinal disarray that has overtaken this small corner of the procedural world. *See, e.g.*, Kogan, *A Neo-Federalist Tale of Personal Jurisdiction*, 63 S. Cal. L. Rev. 257 (1990); Seidelson, *A Supreme Court Conclusion and Two Rationales that Defy Comprehension: Asahi Metal Indus. Co. Ltd. v. Superior Court of California*, 53 Brooklyn L. Rev. 563 (1987); Maltz, *Unraveling the Conundrum of the Law of Personal Jurisdiction: A Comment on Asahi Metal Industry Co. v. Superior Court of California*, 1987 Duke L. J. 669 (1987). In the most recent article on the topic one of the leading young scholars in the field, Professor Wendy Collins Perdue of the Georgetown University Law Center, has written:

> Despite its apparent interest in the subject, the Court has been unable to develop a coherent doctrine. The result has been that every few years the Court's description of personal jurisdiction is inconsistent with its prior precedent (Perdue, *Personal Jurisdiction and the Beetle in the Box*, 32 B. C. L. Rev. 529 (1991)

Lack of coherent doctrine is far from a simple matter of pure academic concern. The question of where to file a lawsuit is a practical decision made by lawyers on the basis of the most minimal information. Often the decision must be made under the press of statutes of limitation before the possibility of discovery can occur. Here a two-year statute of limitations would have expired before Frank Jarvis Atwood was brought to trial and the responsibility for the plaintiffs' injury reasonably clear. Thus the decision to file this case in Arizona, where the victim lived and the crime occurred, was wholly rational and reflected the real substantive interests that Arizona has in

this case. The practical effect of the doctrine of subjective purposeful availment, if in fact it was properly applied here, is to place upon a plaintiff the burden of guessing about what discovery will show the defendants' state of mind to be. Indeed, the burden placed upon the plaintiffs by the doctrine articulated by the court below is even more burdensome because it requires the plaintiffs to demonstrate a jurisdictional factual element, "purposeful direction," that is more stringent than the proof regarding state of mind that is required to establish the tort itself. Requiring the plaintiff to prove intentional direction toward the forum state as predicate to any inquiry of any kind into fundamental fairness seems, therefore, inconsistent with our constitutional adjudication tradition because it applies enhanced standards of review to an ordinary question of due process. Certainly, as in the case at bar, the rigid application of the doctrine of purposeful availment prevents the State of Arizona from protecting its own obviously substantial interest in providing a forum for civil vindication of a crime committed within its boundaries to its own citizen. *See, e.g. McGee v. International Life Insurance Company*, 355 U.S. 220, 78 S.Ct. 199, 2 L.Ed.2d 223 (1957).

For all of those reasons, petitioners submit that the time has come to reconsider the doctrine of purposeful availment and perhaps the meaning of "minimum contacts" as well. Professor Perdue's article surveys the various academic approaches that have been proposed to correct the problems that have surfaced. Some years ago, Professor Louise Weinberg of the University of Texas suggested that strict constitutional scrutiny of jurisdictional decisions be abandoned and the Court return to the

basic due process standard that has emerged in the choice of law area. *See,* Weinberg, *Choice of Law and Minimal Scrutiny,* 49 U. Chi. L. Rev. 440, 469 (1982). Cases such as *Allstate Insurance Company v. Hague,* 449 U.S. 302, 101 S.Ct. 633, 66 L.Ed.2d 521 (1981) and *Sun Oil Co. v. Wortman,* 486 U.S. 717, 108 S.Ct. 2117, 100 L.Ed.2d 743 (1988) demonstrate that due process protections can be afforded without the complexities of strict scrutiny. Petitioners ask that the writ be granted in order to reconsider the standards that should be used to determine jurisdiction under the doctrine of *International Shoe Co. v. State of Washington,* 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945).

III.

The State of California is not a "person" entitled to invoke the individual liberty interests protected by the doctrines of personal jurisdiction developed under the due process clause. As a State of the Union charged with recklessly and wantonly causing pernicious effects beyond its territorial boundary, its protections against litigation in an adjoining state must be found in other consititutional rules such as the principles of cooperative federalism implicit in the full faith and credit clause.

One of the defendants below is the State of California in its governmental capacity. It has total immunity from domestic suit in California and for that reason suit against the State of California can be brought only in Arizona. The Arizona courts would plausibly allow the application of Arizona law, which does not recognize immunity when the action of the responsible state official is wanton or reckless as alleged here. *Baroldy v. Ortho Pharmaceutical Corp.,* 157 Ariz. 574, 760 P.2d 574 (Ariz.App. 1988). *See,*

also, Opinion of Judge Hathaway, App. 12. That choice of law issue is not before this Court, however. What is before this Court is the question of whether the State of California is entitled in its governmental capacity to claim the personal liberty protections of the Fourteenth Amendment's due process clause to defeat the assertion of personal jurisdiction over it. The court below held that it was entitled to do so because the State of Arizona was a "person" within the meaning of the Fourteenth Amendment. This result is inconsistent with the plain language of the amendment, the historical context in which it was proposed and adopted, and the clear intendment of the drafters. Moreover, the inclusion of a state as a Fourteenth Amendment "person" is not congruent with the prior statements of this Court in other contexts, *see, e.g. Pennsylvania v. New Jersey*, 426 U.S. 660, 96 S.Ct. 2333, 49 L.Ed.2d 124 (1976); the square holdings of state courts, *see, e.g. Struebin v. State*, 322 N.W.2d 84, 86-87 (Iowa 1982), and the implications of the holding of this Court in *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989). This is not a case where Congress has directed pursuant to its power under some other provision of the Constitution that states be treated as other jural persons. *See, e.g., Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 109 S.Ct. 2273, 105 L.Ed.2d 1 (1989).

Unique to the Fourteenth Amendment is its specific focus upon protecting the individual from unfair state actions. "The rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights." *Shelley v. Kraemer*, 334 U.S. 1, 22, 68 S.Ct. 836, 846, 92 L.Ed. 1161 (1948). The Amendment by its terms and

obvious intent distinguishes between "persons" and "state[s]." It is a corruption of that deliberate design to allow the amendment to be used to protect a state ***qua*** state from having to account for its extra-territorial torts against an individual. The state of California is, of course, entitled to constitutional protection. But in the context of this case, other clauses such as the Full Faith and Credit Clause and the Commerce Clause provide that protection. The principles of cooperative federalism noted in *Nevada v. Hall*, 440 U.S. 410, 422, 99 S.Ct. 1182, 1190, 59 L.Ed.2d 416 (1979), will protect the sovereign interests of the State of California while at the same time allowing consideration of Arizona's manifest interest in provision of a forum to its injured resident, *McGee v. International Life Insurance Company*, 355 U.S. 220, 78 S.Ct. 199, 2 L.Ed.2d 223 (1957). Because the court below did not allow even a preliminary inquiry into the legitimacy of the forum's manifest interests, petitioners ask that this Court issue the writ to determine the correctness of the lower court's application of the Fourteenth Amendment to protect the State of California from accountability for its extra-territorial torts.

CONCLUSION

Petitioners respectfully request that this Court issue a writ of certiorari to review the decision of the Court below.

Respectfully submitted,

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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

VICKI LYNNE HOSKINSON through the personal representative of her estate, ROBERT FLEMING; DEBORAH JANE CARLSON, individually and as surviving parent of VICKI LYNNE HOSKINSON and GEORGE GLENN CARLSON, JR., husband and wife; STEPHANIE DAWN HOSKINSON by her next friend and mother, DEBORAH JANE CARLSON; CARIE LYNN CARLSON by her next friend and father, GEORGE GLENN CARLSON; BRIAN WILLIAM CARLSON by his next friends and parents, DEBORAH JANE CARLSON and GEORGE GLENN CARLSON, JR., Plaintiffs/Appellants, v. STATE OF CALIFORNIA; CALIFORNIA DEPARTMENT OF CORRECTIONS, a State Agency; CALIFORNIA BOARD OF PRISON TERMS; ROBERT McLEAN, individually and in his official capacity, and JANE DOE McLEAN, husband and wife; Members of the CALIFORNIA BOARD OF PRISON TERMS, individually and in their official capacities;	2 CA-CV 90-0048 DEPARTMENT A OPINION FILED DEC 13 1990

JOHN ATWOOD and ALICE ATWOOD, husband and wife; FRANK JARVIS ATWOOD, a single man,

Defendants/Appellees.

RODNEY PAUL HOSKINSON, individually and as surviving parent of VICKI LYNNE HOSKINSON, deceased,

Plaintiffs/Appellants,

v.

STATE OF CALIFORNIA, CALIFORNIA DEPARTMENT OF CORRECTIONS, a State agency; CALIFORNIA BOARD OF PRISON TERMS; ROBERT McLEAN and JANE DOE McLEAN, husband and wife; MEMBERS OF THE CALIFORNIA BOARD OF PRISON TERMS, individually and in their official capacity; JOHN ATWOOD and ALICE ATWOOD, husband and wife,

Defendants/Appellees.

APPEAL FROM THE SUPERIOR COURT
OF PIMA COUNTY

Cause Nos. 235942 & 235944 (Consolidated)

Honorable James C. Carruth, Judge

AFFIRMED

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and

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LIVERMORE, Presiding Judge.

Frank Jarvis Atwood, a California parolee, kidnapped, sexually abused, and murdered Vicki Lynne Hoskinson in Tucson in September 1984. He was convicted of his crimes and sentenced to death. Vicki Lynne's parents brought this wrongful death suit against

Atwood's parents, his parole officer, the State of California and various California agencies. The theory of the suit was that the defendants knew or reasonably should have known that Atwood was extraordinarily dangerous, that he had travelled through Arizona and might do so again, and that he was imminently likely to engage in sexual violence against a child. Had the defendants exercised reasonable care, it is argued, Atwood's parole would have been terminated or he would have been controlled in some other way and the murder would not have occurred. Plaintiffs appeal from a dismissal of their complaint for lack of personal jurisdiction. They also appeal the trial court's denial of an award of fees, costs and sanctions under A.R.S. § 12-349 arising out of the defendants' improvident removal of this case to federal court. We affirm.

The plaintiffs assert three grounds for jurisdiction: specific jurisdiction, general jurisdiction, and jurisdiction by necessity. As to the first ground, relying on §§ 36[1] and 37[2] of the Restatement (Second) of Conflict of Laws (1971), plaintiffs contend that defendants are subject to jurisdiction in Arizona because, by their tortious failure to control Atwood in California, they either committed a tort in this state or engaged in conduct which they should reasonably have expected would cause an effect in this state. Even assuming the truth of plaintiffs' factual assertions, however, their jurisdictional conclusions fly in the face of the decisions of both the United States Supreme Court and the Arizona Supreme Court.

The core of plaintiffs' argument for specific jurisdiction is that the conduct of the defendants had the foreseeable consequence of injury in Arizona. As the Supreme

Court has made abundantly clear, however, " 'foreseeability' alone has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295, 100 S.Ct. 559, 566, 62 L.Ed.2d 490, 500 (1980). While foreseeability is not irrelevant, the Court explained that "the foreseeability that is critical to due process . . . is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." *Id.* at 297, 100 S.Ct. at 567, 62 L.Ed.2d at 501. Put another way, the defendant must have "fair warning that a particular activity may subject a person to the jurisdiction of a foreign sovereign." *Shaffer v. Heitner*, 433 U.S. 186, 218, 97 S.Ct. 2569, 2587, 53 L.Ed.2d 683, 706 (1977) (Stevens, J., concurring). This fair warning requirement is met

> if the defendant has "purposefully directed" his activities at residents of the forum, *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774, 104 S.Ct. 1473, 1478, 79 L.Ed.2d 790 (1984), and the litigation results from alleged injuries that "arise out of or relate to" those activities, *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 414, 104 S.Ct. 1868, 1872, 80 L.Ed.2d 404 (1984).

Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472, 105 S.Ct. 2174, 2182, 85 L.Ed.2d 528, 541 (1985). As Justice O'Connor wrote in *Asahi Metal Industry Co., Ltd v. Superior Court of California, Solano County*, 480 U.S. 102, 112, 107 S.Ct. 1026, 1033, 94 L.Ed.2d 92, 104 (1987), "[t]he 'substantial connection' . . . between the defendant and the forum State necessary for a finding of minimum contacts must come about by *an action of the defendant purposefully*

directed toward the forum State." (Citation omitted; emphasis original.)

As our supreme court noted in *Batton v. Tennessee Farmers Mut. Ins. Co.*, 153 Ariz. 268, 273, 736 P.2d 2, 7 (1987), "if a defendant purposefully directs its activities at a particular forum, and the effects of its activities are reasonably foreseeable, jurisdiction is proper because the defendant can reasonably anticipate being called to account for its own actions." As this statement implies, however, and as the supreme court has reiterated, foreseeability of the effects of one's conduct is not alone sufficient.[3] The defendant must also have *purposefully* directed his conduct or activities at the forum state. In the present case, even assuming that the defendants should have foreseen or did foresee that Atwood would travel to Arizona and sexually assault a child here, there has been no showing of any kind that the defendants' conduct with respect to Atwood was in any way purposefully directed toward Arizona. Accordingly, the assertion of specific jurisdiction in Arizona would violate due process.[4]

Plaintiffs seek to avoid this result by arguing as to California that it is not a person within the meaning of the Fourteenth Amendment and is therefore not entitled to due process. Accordingly, they argue, the cases requiring minimum contacts for purposes of acquiring jurisdiction are simply inapposite. For this proposition, they cite two cases arising in very different contexts and not addressing due process, *Will v. Michigan Department of State Police*, 491 U.S. ___, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989) and *Pennsylvania v. New Jersey*, 426 U.S. 660, 96

S.Ct. 2333, 49 L.Ed.2d 124 (1976). Moreover, this construction would mean that any state could be sued in any other state on any claim and would constitute a massive intrusion on traditional notions of federalism. Because *Chavez v. State of Indiana,* 122 Ariz. 560, 596 P.2d 698 (1979), required that due process tests be met to obtain personal jurisdiction over a state, and no case has held the contrary, we reject the argument.

Plaintiffs also contend that general jurisdiction may be asserted over the defendant State of California because its contacts with this state are so routine and continuous apart from the present case that it should be treated as doing business here. As a general proposition, general jurisdiction may be asserted over a nonresident defendant who has substantial or continuous and systematic contacts with the forum state whether or not related to the subject matter of the lawsuit. *Helicopteros Nacionales de Columbia, S.A. v. Hall, supra; Batton v. Tennessee Farmers Mut. Ins. Co., supra.* However, we have been cited to no decision, nor found any, upholding the assertion of general jurisdiction by one state over another. While *Nevada v. Hall,* 440 U.S. 410, 99 S.Ct. 1182, 59 L.Ed.2d 416 (1979), makes it clear that one state may be sued in the courts of another when specific jurisdiction is asserted, nothing in that case suggests that the courts of one state are free to assert jurisdiction over another state regardless of whether the subject of the suit involves activities of the defendant state directed at the forum state. The restrictions on jurisdiction arising out of the Due Process Clause "are a consequence of territorial limitations on the power of the respective States." *Hanson v. Denckla,* 357 U.S. 235, 251, 78 S.Ct. 1228, 1238, 2 L.Ed.2d 1283, 1296 (1958). To

hold that one state may assert general jurisdiction over another would obliterate that limitation, as well as the status of states as "coequal sovereigns in a federal system." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. at 292, 100 S.Ct. at 564, 62 L.Ed.2d at 498. Accordingly, we reject the claim of general jurisdiction.[5]

Finally, it is argued that Arizona might have "jurisdiction by necessity" because "all three defendants could not be sued together in a single forum." *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. at 419 n. 13, 104 S.Ct. at 1874 n. 13, 80 L.Ed.2d at 414 n. 13. All defendants here could be sued in California; the doctrine, therefore, does not apply. It is invoked not because of the inability to obtain jurisdiction but rather because Arizona law is more favorable to recovery. Preference is not necessity.

As a separate issue, the plaintiffs contend that the trial court erred in denying an award pursuant to A.R.S. § 12-349(A)(3) for the improvident removal of the action to federal district court. That court has already decided the issue adversely to the plaintiffs, and its decision is res judicata.

Affirmed.

/s/ Joseph M. Livermore
JOSEPH M. LIVERMORE,
Presiding Judge

CONCURRING:

/s/ Michael A. Lacagnina
MICHAEL A. LACAGNINA, Judge

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[1] Section 36 provides in pertinent part:

> (1) A state has power to exercise judicial jurisdiction over an individual who has done, or has caused to be done, an act in the state with respect to any cause of action in tort arising from the act.

[2] Section 37 provides:

> A state has power to exercise judicial jurisdiction over an individual who causes effects in the state by an act done elsewhere with respect to any cause of action arising from these effects unless the nature of the effects and of the individual's relationship to the state make the exercise of such jurisdiction unreasonable.

[3] In *Chavez v. State of Indiana*, 122 Ariz. 560, 596 P.2d 698 (1979), a suit arising out of a child's murder in Arizona by a former inmate of an Indiana mental institution allegedly negligently released two years earlier, our supreme court suggested that foreseeability of harm in Arizona might be sufficient to confer specific jurisdiction. In light of the subsequent decisions in *World-Wide Volkswagen*, *Burger King*, *Asahi*, and *Batton*, we believe this portion of the decision is no longer the law.

[4] The dissent is a protracted jury argument largely based on a disagreement with the immunity provided California parole authorities by California statutes. The tests for personal jurisdiction do not change based on the more advantageous content of the forum state's law. If personal jurisdiction exists in this case, it ought to exist in any case where negligent conduct in one jurisdiction has foreseeable consequences in another. Perhaps that should be the law. So far, it is not.

[5] Because of our disposition of this issue, we do not address the remaining issues raised by plaintiffs concerning comity and discovery limitations.

HATHAWAY, J., Dissenting.

The United States Supreme Court has not addressed the specific jurisdictional issue before us, that is, whether due process permits a state's regulatory interest to be asserted over a defendant whose grossly negligent failure to control a dangerous, multiple child molester and parole violator from another state causes foreseeable harm in the forum. This matter comes before us on summary judgment entered in the trial court. If a genuine issue of material fact appears, the summary judgment should be reversed.

A little girl was kidnaped, sexually abused and murdered in Arizona, allegedly as a consequence of the combined conduct of Atwood, his parents and the gross negligence of a parole officer in California who failed to arrest or control Atwood, a newly-paroled, high risk, mentally disordered, sex offender. The officer possessed reports of at least five separate parole violations, several of which showed Atwood had left California. The parole officer failed to act, contrary to the strict supervision requirements of the Parole Procedures Manual and the California Penal Code §3059, which specifically mandate arrest when a parolee has left the state. This failure to act was in the face of Atwood's classification by the State of California upon his impending release as a "high risk" parolee who required special supervision. One California parole officer testified that it is the practice of Los Angeles agents not to arrest parolees merely for leaving the state. This is in violation of the California Penal Code and is the functional equivalent of intentionally allowing parolees to roam into other states with impunity.

During the four-month period after Atwood's release on parole and before the murder, he was literally "out of control," was addicted to cocaine and speed, was using a wide variety of other illegal drugs, was looking for children to molest, had told a friend that he would kill his next victim, was failing to attend counseling sessions, was carrying a weapon, and was traveling around the states of California, Arizona, New Mexico, Oklahoma and Texas, in violation of his parole and California statutes. Atwood's parents and McLean, his parole officer, had actual knowledge of some of those activities and ignored their duty to find out about the others. For example, police officers in Enid, Oklahoma offered to communicate information to several California agencies – three prisons, the Los Angeles Police Department, and McLean. No one replied to the two urgent teletypes sent several weeks prior to the murder; no one tried to control Atwood's illegal activities. It would appear obvious to any reasonable person, and particularly to a specially-qualified "high risk" parole officer such as McLean, that Atwood's pattern of crime would imminently recur. He had been deemed not subject to rehabilitation.

Atwood's parents, and especially parole officer McLean, should have been profoundly alarmed by Atwood's conduct in violation of parole. The only reasonable response to that knowledge would have been to take Atwood into immediate custody and control. Yet the only person who took action was a police officer from Enid, Oklahoma, whose repeated messages to California authorities were ignored until after the murder had occurred. When the California parole officers discovered that Atwood had been arrested by the FBI in Texas, they

retroactively canceled his parole, which was the first significant act of control exercised by any of the defendants during his four-month spree.

Arizona allows a legal remedy, A.R.S. §§12-820.02 and 41-621(I), when the alleged gross negligence of a parole official results in harm to an Arizona resident. California specifically disallows this remedy, Cal. Govt. Code §845.8.

It is one thing to protect interstate commerce and individuals' due process rights by denying personal jurisdiction over out-of-state tortfeasors absent intentional and meaningful contacts with the forum state, World-Wide Volkswagen Corp., supra. It is quite another to use this rationale to deny legal recourse to those who suffer injury because of gross negligence having clearly foreseeable and grave consequences across a state line. A number of Arizona cities are closer to Los Angeles than the cities of northern California, both in distance and in meaningful contacts.

Arizona's regulatory interest is circumscribed by choice-of-law doctrine as reflected in the Restatement (Second) Conflict of Laws (1988 Revisions). Section 24 states that the underlying principle is "reasonableness." Section 37 deals with the Hoskinson situation, and provides that a state may exercise personal jurisdiction when the defendant "causes effects in the state by an act done elsewhere . . . unless the nature of the effects and of the individual's relationship to the state make the exercise of such jurisdiction unreasonable." Thus §37 concentrates not only on the defendant, as does the "purposeful availment" doctrine, but also on the effects of the act in the

forum state. The comments state that the causing of effects by itself is not a sufficient basis for jurisdiction, but that several factors should be considered: (1) totality of contacts; (2) nature and quality of effects; and, (3) intention and foreseeability. All three factors are significantly present in the instant case.

The first is implicated, the two states being contiguous, sister states within a community of states. Dumping of parole violators, or a lackadaisical attitude of no responsibility of sister states in dealing with or failure to deal with a mobile criminal population, must not be countenanced. The Restatement, §24, comment *a*, defines relationship in its broadest sense, not limited to economic contacts but including "all physical and non-physical circumstances which may serve to link a person with a state." Contiguity alone is not a substitute for "purposeful availment," of course, but merely a component of one of the three factors.

As to the second, the "effect" at issue was a serious crime against an Arizona resident. The Restatement gives the example of a person who explodes dynamite close to the border of a contiguous state, causing injury within that other state. Other examples might include the strict liability required of owners of wild animals whose escape causes injury or damage,[1] or noxious chemicals which poison the air across the border. In such instances, the issue becomes failure to control, rather than intent. In inherently dangerous situations intent is irrelevant.

The third factor, foreseeability, also has no absolute requirement of intent. Rather, foreseeability is established if the act "could reasonably have been expected" to cause

effects within the other state. Certainly a good faith argument can be made that the California officials should have anticipated the strong possibility of crimes in Arizona from a dangerous parole violator who had left the state from Los Angeles. Defendants, by grossly negligent or intentional failure to control a known and extraordinarily dangerous child molester, should be required to bear the risk that he will cause horrendous injury within a reasonable territorial range of activity.

The Supreme Court has already used the "effects" test of §37 to decide a personal jurisdiction issue, Calder v. Jones, 465 U.S. 783, 104 S.Ct. 1482, 79 L.Ed.2d 804 (1984). The Ninth Circuit used it in Brainerd v. Governors of University of Alberta, 873 F.2d 1257 (9th Cir. 1989), finding intent because the out-of-state defendant responded to two phone calls and one letter sent to him from Arizona.

The Arizona Supreme Court used §37 to decide Chavez v. State of Indiana for Logansport State Hosp., 122 Ariz. 560, 596 P.2d 698 (1979), a failure to control case factually similar to this one. The court concluded that the defendants could not reasonably have foreseen a murder in Arizona two years after release. In the present case, the court should also apply §37, but come to the opposite conclusion on foreseeability, because the facts are stronger. The period of time between release and the murder was not two years, but four months; the killer was not a mental patient released in good faith, but a parole violator for whom state law mandated arrest; the earlier killer was out of touch with family and state officials during the two years after his release, whereas the latter had already been labelled "dangerous," had told a friend he

intended to kill a child, and had been in close contact with his family, who allegedly collaborated in his parole violation. The issue is not the simple negligence of *Chavez*, but intentional nonfeasance or gross negligence in violation of the California Penal Code. See A.R.S. §38-443 (public officer who knowingly fails to perform any duty required by law is guilty of nonfeasance.)

The majority's decision relies on a single test for personal jurisdiction – "purposeful availment" – and gives it preeminence over all other considerations, although the Restatement (Second) Conflict of Laws recognizes other factors to be weighed, as previously discussed. The Supreme Court's recent decision in Burnham v. Superior Court, ___ U.S. ___, 110 S.Ct. 2105, 109 L.Ed.2d 631 (1990), ignored the petitioner's plea of lack of "minimum contacts" and asserted personal jurisdiction over him; "purposeful availment" was not a factor. In McAleer v. Smith, 715 F.Supp. 1153, 1157 (D.R.I. 1989), the court insightfully noted in discounting the applicability of the purposeful availment doctrine to tort claims:

> Tortfeasors are at odds with the privileges, benefits, and protections of local laws. Therefore, *jurisdictional determinations in tort cases focus on the causal link between the forum contact and the allegedly tortious act.* (Emphasis added.)

Appellants cite numerous cases in which "purposeful availment" is moderated or even bypassed. O'Neil v. Picillo, 682 F.Supp. 706 (D. R.I. 1988), is particularly instructive. It involved thousands of barrels of volatile, toxic wastes which defendants in one state gave to an intermediary which dumped them in another state. The court used "common sense" (i.e., reasonableness) to find

that, "[a]s other courts have recognized, . . . where a defendant deals in such inherently dangerous products, a lesser showing than is ordinarily required will support jurisdiction." O'Neil, 682 F.Supp. at 714, n.1.

There is even doubt whether the State of California parole board and parole officers, in their official capacities, have any personal jurisdiction defense under the fourteenth amendment's due process clause, which protects "persons." Will v. Michigan Department of State Police, 491 U.S. ___, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989), held that neither a state nor state officials acting in their official capacities are persons for purposes of 42 U.S.C. §1983, which implements §5 of the fourteenth amendment. Much of the reasoning came from dictionary definitions of "person" from the time the fourteenth amendment was adopted which arguably pertains also to its due process clause. See State v. Cochise County, 73 Ariz.Adv.Rep. 3 (11/1/90) (state is not a person in context of county claims statute). Even though *Will* was actually resolving an eleventh amendment issue, the fact is that the jurisprudence of personal jurisdiction is enormously complicated and not reducible to a single, predicate test. See C. A. Wright & A. R. Miller, Federal Practice and Procedure, Civil 2d, §1073 (1987).

Arizona should assert its regulatory interest in this case and take jurisdiction, it appearing, at the least, that gross negligence, if not intentional nonfeasance, is clearly at issue with catastrophic effects in Arizona. The immunity California conferred upon itself for such conduct should not be visited upon Arizona residents. Unaccountability breeds irresponsibility, a standard that Arizona

has rejected. That neither California nor the federal government has seen fit to afford a remedy to a problem created by an arrogant bureaucracy should not leave Arizona victims remedyless in the name of serving federalism, nor should common sense and justice be frustrated.

If the law says that victims of a highly-dangerous, out-of-state parole violator cannot find redress in their home state against his grossly negligent keepers, I find myself concurring with Mr. Bumble: If the laws says that, then the law is "a ass."[2] For the reasons given, I would reverse the summary judgment.

/s/ James D. Hathaway
JAMES D. HATHAWAY,
Judge

---

[1] Appellants point out that "[o]ne cannot defend a suit for damages caused by an uncontrolled vicious animal by claiming it was the 'unilateral' act of the animal . . . The law is clear . . . that the damage is proximately caused by the failure to control and the animal is not the source of independent, intervening cause." See Dobbs, Keaton & Owen, Prosser & Keeton on Torts §76 (5th ed. 1984).

[2] Charles Dickens, *Oliver Twist*, Chapter 51.

SEAL

SUPREME COURT OF ARIZONA

VICKI LYNNE HOSKINSON through the personal representative of her estate, ROBERT FLEMING; DEBORAH JANE CARLSON, individually and as surviving parent of VICKI LYNNE HOSKINSON and GEORGE GLENN CARLSON, JR., husband and wife; STEPHANIE DAWN HOSKINSON by her next friend and mother, DEBORAH JANE CARLSON; CARIE LYNN CARLSON by her next friend and father, GEORGE GLENN CARLSON; BRIAN WILLIAM CARLSON by his next friends and parents, DEBORAH JANE CARLSON and GEORGE GLENN CARLSON, JR., Plaintiffs/Appellants, vs. STATE OF CALIFORNIA; CALIFORNIA DEPARTMENT OF CORRECTIONS, a State Agency; CALIFORNIA BOARD OF PRISON TERMS; ROBERT McLEAN, individually and in his official capacity, and JANE DOE McLEAN, husband and wife; Members of the CALIFORNIA BOARD OF PRISON TERMS, individually and in their official Capacities; JOHN ATWOOD and ALICE ATWOOD, husband and wife; FRANK JARVIS ATWOOD, a single man, Defendants/Appellees.	Supreme Court No. CV-91-0030-PR Court of Appeals No. 2 CA-CV 90-0048 Pima County Nos. 235942 and 235944 (Consolidated) ORDER FILED JUL - 9 1991

RODNEY PAUL HOSKINSON, individually and as surviving parent of VICKI LYNN HOSKINSON, deceased,

Plaintiffs/Appellants.

vs.

STATE OF CALIFORNIA, CALIFORNIA DEPARTMENT OF CORRECTIONS, a State agency; CALIFORNIA BOARD OF PRISON TERMS; ROBERT McLEAN and JANE DOE McLEAN, husband and wife; MEMBERS OF THE CALIFORNIA BOARD OF PRISON TERMS, individually and in their official capacity; JOHN ATWOOD and ALICE ATWOOD, husband and wife,

Defendants/Appellees.

The Petition for Review came before the court at conference on June 11, 1991. On consideration,

IT IS ORDERED that the Petition for Review is denied. Vice Chief Justice Feldman and Justice Cameron voted to grant for the following reasons:

The exercise of *in personam* jurisdiction is based on considerations of due process and on principles of "fundamental fairness." *State v. Velasco*, 165 Ariz. 480, 487, 799 P.2d 821, 824 (1990). The court of appeals thus concludes that it is fundamentally unfair and would thus violate due process for Arizona to assert jurisdiction over the instant case.

Our view is quite the opposite. This tort occurred in Arizona, the victim resided in Arizona, and her family are residents of Arizona. The alleged tortious conduct would foreseeably cause the very harm that occurred in Arizona.

Given modern conditions, it is difficult to see why it is unfair to require these defendants to answer and defend in Arizona. Logistics certainly present no greater difficulty for the governmental defendants and even the individual defendants to appear and defend in Tucson than in Yreka, Riverside, or Azusa. It is no longer necessary to send counsel instructions via Wells Fargo. The telephone, the facsimile machine, and the photocopier answer the logistical problems as easily for lawsuits pending in Arizona as those in Imperial County, California. Law firms capable of handling cases such as this practice on a national and regional basis, and defendants will not be deprived of competent counsel even if forced to respond in Arizona.

Depriving these victims of a forum to redress their grievances is a greater violation of due process than compelling the defendants, whose conduct may have caused this tragedy, to defend themselves in Arizona. Reality tells us that it is time to reexamine some of our previous conclusions, even those in so recent a case as *Batton v. Tennessee Farmers Mutual Insurance Co.*, 153 Ariz. 268, 736 P.2d 2 (1987). If this is not possible under the current decisions of the United States Supreme Court, then, with all due respect, we suggest that the time may have come for that Court to reconsider the issue. However, as Judge Hathaway points out in his dissent, we

cannot be sure the Supreme Court's decisions require dismissal of this action for lack of personal jurisdiction.

We would grant review.

Dated this 9th day of July, 1991.

/s/ Frank X. Gordon, Jr.
FRANK X. GORDON, JR.
Chief Justice

Record returned to the Court of Appeals, Division Two, Tucson, this 9th day of July, 1991.

RE: VICKI LYNNE HOSKINSON et al vs. STATE OF CALIFORNIA, et al;
RODNEY PAUL HOSKINSON, et al vs. STATE OF CALIFORNIA, et al
Supreme Court No. CV-91-0030-PR
Court of Appeals No. 2 CA-CV 90-0048
Pima County Nos. 235942 and 235944 (Consolidated)
ORDER
Page 4 of 4

TO:

Winton Woods, Jr., Esq.

Gonzales & Villarreal, P.C. – ATTN: Elizabeth C. Peasley, Esq.

Haralson, Kinerk & Morey, P.C. – ATTN: Dale Haralson, Esq., and Gregory G. Wasley, Esq.

Lewis and Roca – ATTN: John P. Frank, Esq., Steven Labensky, Esq., and Anne Rachel Aberbach, Esq.

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Joyce A. Goldsmith, Clerk, Court of Appeals, Division Two, Tucson

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ARIZONA SUPERIOR COURT, PIMA COUNTY

Judge:
JAMES C. CARRUTH
Court Reporter: None

CASE NO. 235942
DATE March 13, 1989

VICKI LYNN HOSKINSON, et al., ( )

Plaintiffs, ( )

-vs- ( )

STATE OF CALIFORNIA, et al., ( )

Defendants. ( )

EVENT SUMMARY

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MINUTE ENTRY

UNDER ADVISEMENT RULING ON MOTIONS TO DISMISS:

Pending are a Motion to Dismiss on jurisdictional grounds brought by defendants John and Alice Atwood, residents of California and parents of defendant Frank Jarvis Atwood, and a similar motion brought by the defendants State of California, California Department of

Corrections, California Board of Prison Terms, and certain individual employees and agents of the State of California (hereinafter "the California defendants").

No dispute has been raised respecting the jurisdiction of Arizona Courts over the defendant Frank Jarvis Atwood arising from the atrocities alleged to have been committed here against plaintiffs' decedent, Vicki Lynn Hoskinson, and indeed a liability determination against that defendant has already been made. The motions now in question are brought by the remaining defendants, all of whom assert that the Courts of Arizona lack jurisdiction to entertain the claims which Plaintiffs have brought against them.

Each of the motions to dismiss questions whether assertion of *in personam* jurisdiction in Arizona Courts over the Atwood parents and the California defendants complies with the requirements of Arizona's Long-Arm Statute (Civil Rule 4(E)(2)) and the requirements of the United States and Arizona constitutions respecting due process and traditional notions of fair play and substantial justice. Additionally, the motion of the California defendants raises principles of sovereign immunity and comity.

Having now considered the matter, this Court is of the opinion that each of the motions is well-taken and that a finding of *in personam* jurisdiction in Arizona would require a departure from existing law which would be inappropriately made by a trial court.

What follows below is a summary of this Court's analysis.

The parties have engaged in substantial, if not unlimited, discovery procedures. The evidence now available suggests that plaintiffs can show that defendant Frank Jarvis Atwood, in mid-September, 1984, viciously abducted, molested and murdered Vicki Lynn Hoskinson in Tucson, Arizona, some 4 months following his release from the California State Prison System. At that time, the evidence would indicate that his parents and the California defendants were aware of his criminal history dating back to 1971, which history included 5 imprisonments, parole supervision on 3 occasions, and probationary supervision on 5 occasions. The record would also suggest that defendant Frank Jarvis Atwood was known by his parents and the State of California to have serious problems associated with substance abuse and sexual deviancy which he had failed to confront and correct despite the considerable intervention and assistance of many parole and probation programs and their related therapy and counseling. While it might be that California's statutory length-of-confinement guidelines required Atwood's release on parole in May, 1984, it was clear then that he would be a high risk to recidivate and would require close parole supervision. The parole supervision plan then adopted by the State of California was supposed to accomplish such supervision but was arguably inadequate and did not accomplish its purpose. At that time, Frank Jarvis Atwood was 28 years old, was emancipated from his parents who, though long suffering, had no control over his actions. It is noted that prior to the tragic events in Tucson which culminated in the death of Vicki Lynn Hoskinson, John Atwood had told Frank Atwood's parole officer, Mr. Robert McLean, about Frank

Atwood's violation of parole conditions, and that the Atwood parents were unable to control him and were unwilling to provide a home for him. The Atwood parents also requested that the California authorities take their son back into custody for various parole violations. At that point, however, the whereabouts of defendant Frank Jarvis Atwood were unknown and were not to be learned until he was arrested in Kerrville, Texas, following the tragic abduction and murder here in Tucson.

Does the available evidence suggest that the Atwood parents and the California defendants "caused an event to occur" in Arizona (Rule 4(E)(2) AR Civ. P) so as to make it appropriate that they be subject to suit in Arizona? The current state of the law seems to require a negative answer.

For purposes of the motions, the Court assumes that no showing can be made that any of the movants have engaged in the kind of "substantial, continuous and systematic" contacts with the State of Arizona which are required to give the Courts of this State "general" jurisdiction over them. *See* e.g., *Helicopteros, Burger King* and *Batton*. Whether "specific" jurisdiction may be maintained here depends upon whether the facts in this case establish the existence of necessary "minimum contacts" which would justify an Arizona Court in determining that the conduct of the Atwood parents and of the California defendants is such as to make it reasonable for them to anticipate being haled into court in Arizona for actions of Frank Jarvis Atwood. In addition to aspects of foreseeability, however, such defendants must also be

found to have "purposefully availed" themselves of contacts with Arizona which would entitle them to the benefits and protections of Arizona's law. *See Hanson v. Denckla, Burger King* and *Batton*. It seems to this Court that there simply is no such evidence to support a finding of purposeful availment that would support jurisdiction in this case over either the Atwood parents or the California defendants. No contacts have been shown, let alone "minimum contacts."

With respect to the California defendants' additional arguments concerning sovereign immunity and comity, this Court concludes that *Nevada v. Hall* does not here apply to support jurisdiction because there is no indication that Arizona would be allowed to, in any manner, control or review the exercise of government responsibilities by the State of California, and because there is nothing to indicate that California took any direct action in Arizona with regard to Frank Jarvis Atwood. The "parolee cases" involving intentional placement of parolees in sister states are found to be inapposite.

With regard to the comity question, it is noted that Mr. Frank's argument on behalf of the California defendants seemed to invite suit in the State of California. It appears to be the law in Arizona that notions of comity should allow the State of California the deference and mutual respect to determine the operation of its parole system because of the importance of that operation to California's own system of government. Also, it seems that the courts of California should be given the opportunity to resolve the troublesome constitutional issues associated with the California statute which proports to deny liability to non-residents for torts inflicted by the

State of California or its agents while allowing for compensation for such torts to California residents.

For the foregoing reasons,

IT IS ORDERED that the Motions to Dismiss are GRANTED. The dismissals are to be without prejudice.

Mr. Pelander and Mr. Frank are requested to prepare appropriate forms of dismissal orders for the Court's signature.

cc: Haralson, Kinerk & Morey – Dale Haralson, Esq.
Winton D. Woods, Jr., Esq. – U of A, College of Law – Tucson 85721
Gonzales & Villarreal – Elizabeth Peasley-Fimbres, Esq.
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Under Advisement Clerk
Hon. James C. Carruth

Jackie Haag
Deputy Clerk

Supreme Court, U.S.
FILED
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No. 91-361

In The

Supreme Court of the United States

October Term, 1991

VICKI LYNNE HOSKINSON, et al.,

Petitioners,

v.

STATE OF CALIFORNIA, et al.,

Respondents.

Petition For Writ Of Certiorari To The Arizona Court Of Appeals Division Two

BRIEF OF RESPONDENTS JOHN AND ALICE ATWOOD IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A. Did the Arizona courts correctly conclude that personal jurisdiction could not be constitutionally asserted in Arizona against Respondents John and Alice Atwood, California residents who had no "minimum contacts" with Arizona, who did not purposefully direct any activities into or towards Arizona or purposefully avail themselves of any benefits or privileges of Arizona law, and where Arizona's exercise of personal jurisdiction over them would have been fundamentally unfair and unreasonable?

B. Should this Court overturn or substantially modify well-established principles from its prior decisions, by abandoning or disregarding any "purposeful direction" or "minimum contacts" requirements as threshold predicates for personal jurisdiction?

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STATEMENT OF THE CASE

Petitioners' "Statement of the Case" is replete with factual allegations that are greatly overstated, and many of which have no relevance or application to Respondents John and Alice Atwood [hereinafter referred to as the "Atwood parents"]. Their son, Frank Jarvis Atwood, was 28 years old during the relevant time frame in 1984. The record compiled in the Arizona trial court established that the Atwood parents had no power or control whatsoever over Frank's parole conditions or supervision, let alone any ability to revoke his parole or have him arrested and taken into custody. The trial court record also established the following uncontested facts:

- The Atwood parents were not specifically advised of the terms or conditions of Frank's parole in May, 1984, when he was released from the California penal system; and the Notice and Conditions of Parole form was not signed by or furnished to the parents.
- There was no parole condition or requirement that Frank reside with his parents at any time, nor was there any parole condition obligating the parents to keep anyone informed of Frank's whereabouts, residence or anything else.
- The parents of an adult parolee are not required or expected to monitor or supervise the conditions of parole.
- Information furnished by relatives (including parents) of a parolee normally does not justify, or immediately result in, the revocation of parole or the arrest of the parolee, but rather corroborating information is needed.

These undisputed facts clearly refute Petitioners' contention of an "intentional failure," at least on the Atwoods' part, to "exercise their specific duty to control the actions of Frank Jarvis Atwood" [Petition at 4], let alone Petitioners' claim of "reckless and wanton conduct" on the part of the Atwood parents. [*Id.* at 6-7]. Contrary to Petitioners' repeated suggestions, the Arizona Court of Appeals did not assume, let alone find, that the Atwood parents engaged in any "reckless and wanton misconduct, intentionally undertaken with full awareness of the possible consequences" in Arizona. [*Id.* at 14]. Far from being "fully supported by the record," as Petitioners suggest [*Id.* at 11], there was no evidence to support any such finding or conclusion with respect to Respondents Atwood. In essence, Petitioners have extracted a hypothetical assumption from *dicta* in the Court of Appeals' opinion [Petitioners' App. 4, 6], and now want to transform and elevate it into a factual finding, when there was no evidentiary support in the record for that at all.[1]

Also undisputed is the fact that, at all relevant times, the parents themselves had absolutely no significant contacts, involvement or interest in the State of Arizona. As the Arizona trial court properly concluded, "[n]o contacts have been shown, let alone 'minimum contacts.' " [Petitioners' App. 27].

---

[1] Regardless of the various *arguendo* assumptions made in the Arizona Court of Appeals' opinion, there was absolutely no evidence to support any contention that the Atwood parents "should have foreseen or did foresee that [Frank] Atwood would travel to Arizona and sexually assault a child here." [Petition at 7, quoting from Petitioners' App. 6].

Petitioners contend that "Frank Atwood was allowed to roam free and uncontrolled across the southwestern United States." [Petition at 4]. The facts, however, established that Frank had left the State of California on only two occasions between May and September, 1984. His destination both times was Oklahoma (not Tucson or anywhere else in Arizona), and his sole purpose in leaving California at all was to visit a friend (Mr. Bersienne) in Oklahoma. General and Mrs. Atwood had no prior knowledge of either of the two out-of-state trips, nor did they encourage or condone those. On the contrary, immediately after discovery of Frank's whereabouts, the parents contacted Frank and strongly urged him on both occasions to return to California, which he did.

After Frank's return from the second Oklahoma trip in early September, 1984, Respondent John Atwood voluntarily called Frank's parole agent, Respondent Robert McLean. In that phone conversation of September 6, 1984, at a time when Frank was still residing at the Atwood residence, General Atwood specifically advised McLean of the following:

- That Frank had made two trips to Oklahoma;
- That Frank had been alone with a 5 or 6 year old child in Oklahoma (a fact which General Atwood had learned directly from Frank);
- That Frank had sent a sexually explicit card to the child;
- That Frank was carrying a knife with a 4-5 inch blade;
- That Frank had also taken an extended trip to northern California in early August, 1984,

during which time he befriended one James McDonald, who became his traveling companion.

These undisputed facts belie Petitioners' accusation that "defendants did virtually nothing" in an effort to comply with whatever obligations they might have had [Petition at 4]. Moreover, contrary to the conclusory statement in Judge Hathaway's dissent in the Arizona Court of Appeals, there was no evidence at all that General and Mrs. Atwood "collaborated in [Frank Atwood's] parole violation." [Petitioners' App. 15].

Frank Atwood and his friend, Mr. McDonald, left the Atwood residence together in mid-September, 1984. They were equipped with camping gear and did not indicate where they were going.[2] General and Mrs. Atwood did not suspect or have any reason to believe that any out-of-state trips were in Frank's plans when he and McDonald left. On both prior occasions when Frank had left California, without his parents' knowledge or consent, it was to

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[2] The trial court record established the following: During times when Frank resided with his parents, it was not unusual for him to leave their residence and visit friends or go elsewhere for several days at a time, without telling his parents where he was or what his plans were. When Frank and McDonald left in mid-September, 1984, it was General and Mrs. Atwood's belief that they were going camping in the L.A. area. Though not expressed to the parents, if Frank and McDonald had any plans on leaving the L.A. area, General and Mrs. Atwood reasonably would have suspected that they might return to northern California, where Frank had traveled and stayed in early August, 1984, and from where McDonald's welfare checks were issued.

go visit Mr. Bersienne in Oklahoma; and any relationship between Bersienne and Frank Atwood admittedly was over as of September, 1984.

The abduction and murder of Vicki Lynne Hoskinson occurred on September 17, 1984, just two or three days after Frank and McDonald left the Atwood residence. After Frank's departure, General and Mrs. Atwood had no contact with him until September 20, 1984, when he called and informed them that he was in Texas. Within a few hours of first learning that the FBI was attempting to locate Frank, General Atwood voluntarily contacted the FBI on that same date, September 20, and informed them of Frank's specific whereabouts. It was that information that directly led to Frank's being located, arrested and extradited to Arizona.

While ignoring most of these uncontested facts supporting the Arizona courts' jurisdictional determination, Petitioners instead rely on the "facts . . . spelled out in more detail in the dissenting opinion of Judge Hathaway in the Court below" [Petition at 4]; but many of Judge Hathaway's observations had no relevance or application to the Atwood parents, and others were simply unsupported by the record. Judge Hathaway's dissenting opinion certainly was "impassioned," as Petitioners indicate [*Id.* at 7], but the majority opinion properly characterized the dissenting opinion as "a protracted jury argument" [Petitioners' App. 9, n. 4]; and the dissenting opinion had some significant factual omissions and misperceptions relating to the Atwood parents, as noted above.

Finally, Petitioners incorrectly suggest that realistically they had "no other functional or convenient

forum open to them." [Petition at 8]. That certainly is not true with respect to General and Mrs. Atwood, long-time California residents who easily could have been sued in that state, with no statutory or other legal impediments.

SUMMARY OF ARGUMENTS

A. The Petition for Writ of Certiorari should be denied because the Arizona court properly dismissed, without prejudice, Respondents John and Alice Atwood for lack of *in personam* jurisdiction in this action. That ruling, based on the Atwood parents having no "minimum contacts" at all with Arizona, was fully supported by the record and totally consistent with constitutional principles enunciated by this Court.

B. There are no special and important reasons warranting a writ of certiorari in this matter, nor is there any compelling reason to abandon or disregard "minimum contacts" requirements for personal jurisdiction.

ARGUMENTS IN OPPOSITION TO PETITIONERS' PETITION FOR WRIT OF CERTIORARI

A. The Petition for Writ of Certiorari should be denied because the Arizona courts' ruling that personal jurisdiction could not be constitutionally invoked over Respondents John and Alice Atwood in Arizona was correct and totally consistent with this Court's clear, controlling pronouncements.

From the inception of this case, Petitioners' jurisdictional argument has contained a major, glaring flaw which destroys any assertion of personal jurisdiction over

the Atwood parents. Petitioners all but conceded in the courts below that the Atwoods themselves had no "minimum contacts" with Arizona, did not purposefully direct any activities towards this state, and did not purposefully avail themselves of any privileges or benefits in Arizona. At bottom, Petitioners wish to bypass or overturn those requirements.

Instead, Petitioners seek to invoke personal jurisdiction over the Atwood parents solely on the basis of Frank J. Atwood's sordid background and criminal history, and his activities and travels from May-September, 1984. Petitioners further contend, without the benefit of any factual support in the record, that Frank Atwood's going to Arizona in September, 1984 and committing a heinous crime there was foreseeable to his parents, and was with their "full awareness of the possible consequences." [Petition at 9]. Petitioners also rely exclusively on such factors as Arizona's interest in adjudicating this controversy; the alleged convenience of the Arizona forum; and Petitioners' claim that the Atwood parents had fair warning and are not unduly surprised by a lawsuit against them in Arizona.

As this Court has repeatedly recognized, however, all of the foregoing factors are of secondary consideration and importance, and do not displace the primary requirement of "minimum contacts" that is central to the threshold jurisdictional determination. it is now well-settled that "[t]he Due Process Clause protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful 'contacts, ties, or relations.'" *Burger King Corp. v.*

Rudzewicz, 471 U.S. 462, 471-72 (1985), *quoting International Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945). Equally well-established is the principle that jurisdiction must rest upon contacts which "proximately result from actions by the defendant *himself* that create a 'substantial connection' with the forum State." *Burger King Corp. v. Rudzewicz, supra* at 475, *quoting McGee v. International Life Ins. Co.*, 355 U.S. 220, 223 (1957) (emphasis in original).

In essence, Petitioners seek to impute Frank Atwood's contacts with Arizona to his parents. There is no authority to support that position, however, and in fact the applicable decisions completely negate that proposition.[3] Jurisdiction cannot be vicariously invoked over the Atwood parents based on the activities or travels of their emancipated, adult son. Rather, it was incumbent upon Petitioners to establish that the parents themselves purposefully created contacts with the forum state. Petitioners' inability to do so properly resulted in dismissal without prejudice of Respondents Atwood from this

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[3] *See Calder v. Jones*, 465 U.S. 783, 790 (1984) (in finding jurisdiction over defendants who were "primary participants in an alleged wrongdoing [libelous article in National Enquirer] intentionally directed" at a resident of the forum state, the Court noted that a defendant's contacts with the forum state "are not to be judged" according to the activities of others in the forum state: "Each defendant's contacts with the forum State must be assessed individually."); *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408, 417 (1984) ("unilateral activity of another party or a third person is not an appropriate consideration when determining whether a defendant has sufficient contacts with a forum State to justify an assertion of jurisdiction"); *Rush v. Savchuk*, 444 U.S. 320, 331-32 (1980).

action; and that ruling was entirely consistent with this Court's decisions.

In *Hanson v. Denckla*, 357 U.S. 235 (1958), the Court held that the "minimum contacts" requirement of *International Shoe Co. v. Washington, supra*, is met only when the defendant has "purposefully avail[ed] [himself] of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Id.* at 253. Since that time, the Court has consistently upheld the purposeful availment requirement.[4] The *Burger King* case is a prime example of this. The Court in that case recognized each of the concepts that Petitioners rely upon so heavily in this matter, *e.g.*, "fair warning;" legitimate interests of the forum state; and access to a convenient forum. After recognizing such concerns and considerations, however, the *Burger King* Court was careful to note as follows:

> Notwithstanding these considerations, the constitutional touchstone remains whether the defendant purposefully established "minimum contacts" in the forum State. Although it has been argued that foreseeability of causing *injury* in another State should be sufficient to establish such contacts there when policy considerations so require, the Court has consistently held that

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[4] As the author in a leading Law Journal has noted: "Taken together, *World-Wide Volkswagen* (444 U.S. 286), *Keeton* (465 U.S. 770) and *Burger King* (471 U.S. 462) clearly establish the primacy of the concept of purposeful availment in personal jurisdiction analysis." Maltz, *Unraveling the Conundrum of the Law of Personal Jurisdiction: A Comment on Asahi Metal Industry Co. v. Superior Court of California*, 1987 Duke L.J. 669, 674. *See also Kulko v. Superior Court*, 436 U.S. 84, 94 (1978).

this kind of foreseeability is not a "sufficient benchmark" for exercising personal jurisdiction. Instead, "the foreseeability that is critical to due process analysis . . . is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." In defining when it is that a potential defendant should "reasonably anticipate" out-of-state litigation, the Court frequently has drawn from the reasoning of *Hanson v. Denckla*, 357 U.S. 235, 253 (1958):

> "The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State. The application of that rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."

This "purposeful availment" requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of "random," "fortuitous," or "attenuated" contacts, or of the "unilateral activity of another party or a third person." Jurisdiction is proper, however, where the contacts proximately result from actions by the defendant *himself* that create a "substantial connection" with the forum State. [471 U.S. at 474-75 (citations and footnotes omitted; emphasis in original)].

Contrary to Petitioners' suggestion, *Burger King* did not simply indicate "that the essence of 'purposeful availment' is that the defendant's connection with the forum

not be the result of 'random, fortuitous, or attenuated contacts, or of the unilateral activity of another party or third person.' " [Petition at 12]. Rather, this Court recognized and approved the " 'purposeful availment' requirement." 471 U.S. at 475.[5]

In *Asahi Metal Ind. Co. v. Superior Court*, 480 U.S. 102 (1987), the purposeful availment requirement again was reaffirmed. Justice O'Connor's opinion rejected "mere foreseeability or awareness" as a "constitutionally sufficient basis for personal jurisdiction," noting that the " 'substantial connection' between the defendant and the forum State necessary for a finding of minimum contacts must come about by *an action of the defendant purposefully directed toward the forum State*." 480 U.S. at 111, 112 (emphasis in original, citations omitted). Under Justice O'Connor's opinion, jurisdiction was found lacking, partly because the defendant did not "purposefully avail itself of the California market." 480 U.S. at 112.

While Justice Brennan's opinion disagreed with that conclusion, that disagreement was not based on any abandonment of the purposeful availment requirement.

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[5] Only if and when that requirement has been met, by the plaintiff establishing that defendant purposefully directed some activities at the forum state, is consideration of the other reasonableness and fairness factors warranted. *See Burger King Corp. v. Rudzewicz, supra* at 476 ("Once it has been decided that a defendant purposefully established minimum contacts within the forum State, these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with 'fair play and substantial justice.' ").

Rather, Justice Brennan simply concluded that the defendant had purposefully availed itself of the California market, since it was "aware that the final product [was] being marketed in the forum State." *Id.* at 117. Justice Stevens simply saw no need for the Court in that particular case "to articulate 'purposeful direction' or any other test as the nexus between an act of a defendant and the forum State that is necessary to establish minimum contacts." *Id.* at 122. Thus, the purposeful availment requirement remains intact.[6]

Any argument that that requirement has somehow been met with respect to the Atwood parents is not only inconsistent with this Court's decisions, but is devoid of any evidentiary support, logic or common sense. Regardless of whether the "purposeful availment" inquiry is addressed from an objective or subjective viewpoint, it makes no difference in this case. While Petitioners' attempted distinction between objective and subjective

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[6] As one leading commentator has observed: "*Asahi* thus clearly establishes that the existence of minimum contacts is a necessary but not sufficient condition to satisfy the constitutional requirements for personal jurisdiction," and "purposeful availment remains the most important element in almost all personal jurisdiction cases; the question dividing the Court concerns what constitutes purposeful availment." Maltz, *Unraveling the Conundrum of the Law of Personal Jurisdiction: A Comment on Asahi Metal Ind. Co. v. Superior Court of California*, 1987 Duke L.J. pp. 669-91, at pp. 681, 682. The author concluded that "[a]ll [of the Justices] (with the possible exception of Justice Brennan) agree on one basic premise – that it is fundamentally unfair to require a person to defend himself before the courts of a sovereign with which he has not voluntarily associated himself." *Id.* at 683.

factors is not at all clear, even under Petitioners' analytical framework the Atwood parents did not have any "objectively reasonable expectation of an effect in the forum" proximately caused by any alleged act or omission on their parts. [Petition at 9].

Petitioners' position in this case is best summed up by their assertion that "the existence of reasonable anticipation of litigation in the impacted forum" satisfies all due process requirements for a state's assertion of personal jurisdiction over a non-resident defendant [Petition at 12].[7] While Petitioners rely on *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980) and *Burger King Corp. v. Rudzewicz, supra*, to support that premise, those cases actually refute most of Petitioners' arguments and clearly support the Arizona courts' disposition of this matter. Petitioners' entire argument is premised on the contention that the Atwood parents knew or should have known that Frank would travel to Arizona and commit a crime there. Aside from the absence of any factual support in the record for that contention, it is certainly well-

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[7] A similar contention was made by Petitioners' Counsel of Record in a 1979 law review article, which took issue with well-established personal jurisdiction law in Arizona and this Court's cases. The author urged that the purposeful activity requirement be abandoned and that jurisdictional determinations be based only on "fair notice" and fairness factors. Based on his proposed jurisdictional framework, the author also incorrectly predicted this Court's disposition of the *World-Wide Volkswagen* case. *See* Woods, *Pennoyer's Demise: Personal Jurisdiction After Schaffer and Kulko and a Modest Prediction Regarding World-Wide Volkswagen Corp. v. Woodson*, 20 Ariz. L. Rev. 861-913 (1979). The thesis advocated in that article, however, has never been embraced or adopted by this Court.

established that "foreseeability of causing *injury* in another State" is not a " 'sufficient benchmark' for exercising personal jurisdiction." *Burger King Corp. v. Rudzewicz*, 471 U.S. at 474; *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. at 295.

Petitioners' reliance on *Calder v. Jones*, 465 U.S. 783 (1984) also is misplaced.[8] The Court in *Calder* distinguished between general, untargeted negligence and the tortious actions by Mr. Calder which were expressly aimed at the forum state. Defendant Calder knew the potentially devastating impact of the libelous article edited, approved and disseminated in the forum state by him. He knew that the brunt of any injury would be felt in the state where the plaintiff lived and worked, and in which the libelous publication had its largest circulation. Under those circumstances, the Court held that "jurisdiction over petitioners in California is proper because of their intentional conduct in Florida calculated to cause injury to respondent in California." 465 U.S. at 791. *Calder* simply underscores the inapplicability of the "effects"

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[8] Also unavailing is Petitioners' reference to section 37 of the Restatement (Second) Conflict of Laws. Application of that section hinges primarily on the "extent of the relationship of the state to the defendant and to the plaintiff." *Id.* Comment (a). The Atwood parents had no significant relationship to Arizona. Moreover, the so-called "effects" test of Restatement section 37 has never been applied to invoke jurisdiction in any reported cases even remotely resembling this one; and the Restatement cannot displace the Constitution's due process requirements. *See, e.g., Jacobs v. Lakewood Aircraft Serv., Inc.*, 493 F. Supp. 46, 50 (E.D. Pa. 1980); *Chittenden Trust Co. v. LaChance*, 464 F. Supp. 446, 449 n.3 (D. Vt. 1978).

analysis here and further supports the Arizona courts' dismissal of Respondents Atwood.

Petitioners' assertion of jurisdiction over the Atwood parents through an "effects" analysis also is undermined by *Kulko v. Superior Court*, 436 U.S. 84 (1978). Just as the non-resident father in *Kulko* "derive[d] no personal or commercial benefit from his child's presence in California and . . . lack[ed] any other relevant contact with the State" (436 U.S. at 100-01), the same is true of the Atwood parents regarding Frank's presence in Arizona. Thus, as in *Kulko*, "application of the minimum-contacts test in this case [would represent] an unwarranted extension of *International Shoe* and would, if sustained, sanction a result that is neither fair, just, nor reasonable." *Id.* at 92.[9]

The Arizona trial court's ruling and the Court of Appeals' affirmance were properly based on the conclusion that no evidence was presented "to support a finding of purposeful availment that would support jurisdiction in this case;" that "[n]o contacts have been shown, let alone 'minimum contacts;' " and that the Atwood parents engaged in no conduct that would "make it reasonable for them to anticipate being haled into court in Arizona for actions of Frank Jarvis Atwood." [Petitioners' App. 26-27]. Although this case involves a heinous crime, familial tragedy and emotionally powerful issues, that

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[9] *Kulko*, of course, is factually distinguishable from our case, and presented a stronger argument for jurisdiction, in that the non-resident parent knowingly and voluntarily sent his minor child to the forum state. In contrast, General and Mrs. Atwood did not encourage, request or direct their adult son to go to Arizona, let alone have any reason to know that he might engage in any criminal activity in that state.

should not be sufficient reason for granting review. The petition should be denied because the Arizona Court of Appeals' opinion was governed by, and totally consistent with, well-established constitutional principles recognized by this Court.[10]

B. There are no compelling reasons for this Court to overturn or substantially modify well-established personal jurisdiction principles, or to create unwarranted exceptions to the purposeful availment requirement in isolated cases.

Unable to reconcile their jurisdictional argument with this Court's decisions, Petitioners seek to overturn well-established precedent and decades of jurisdictional jurisprudence by either abandoning the purposeful availment requirement altogether, or by excepting this particular case from that constitutional prerequisite. This Court

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[10] The "special and important reasons" required for granting of a petition for writ of certiorari are conspicuously absent here. Moreover, this case does not involve a state court decision on "an important question of federal law which has not been, but should be, settled by this Court," or on "a federal question in a way that conflicts with applicable decisions of this Court." Supreme Court Rule 10. Indeed, the Court has recently denied certiorari in a case where the Sixth Circuit Court of Appeals ordered dismissal for lack of personal jurisdiction because the plaintiff "failed to pass the 'purposeful availment' test," which the Court of Appeals viewed as "essential" and even characterized as "the *sine qua non* for *in personam* jurisdiction.' " *LAK, Inc. v. Deer Creek Enterprises*, 885 F.2d 1293, 1300-03 (6th Cir. 1989), *quoting Southern Mach. Co. v. Mohasco Ind., Inc.*, 401 F.2d 374, 381-82 (6th Cir. 1968), *cert. denied*, 110 S. Ct. 1525 (1990).

should decline that invitation. There is no reason to simply discard the purposeful availment requirement in this case or in certain select cases, depending on the nature of the plaintiff's factual allegations or legal liability theories.[11]

Such an arbitrary, unprincipled approach would certainly result in much greater chaos and confusion than what Petitioners complain of now. It also would present opportunities for abuse. For example, plaintiffs might be inclined to plead dubious negligence claims in their complaints against nonresident defendants in order to benefit from less stringent standards for establishing jurisdiction. In short, the presence or absence of minimum contacts for jurisdictional purposes should not be governed by different standards depending upon the nature of the action.

Petitioners' concern that the Arizona Court of Appeals' opinion will exclude "from interstate personal jurisdiction all non-intentional torts" [Petition at 14] is unfounded. One can purposefully direct activities towards a forum state and be held accountable for negligence relating to such activities which proximately cause harm or damage in the forum state. Negligence (as a substantive basis for tort liability) and purposeful availment or direction (for jurisdictional purposes) are not

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[11] The contrary decisions of the Rhode Island District Court appear to be isolated anomalies, with no other authority to support, or other courts accepting, its view that the "purposeful availment doctrine does not apply to tort claims." *McAleer v. Smith*, 715 F. Supp. 1153, 1157 (D.R.I. 1989); *Bridge v. Invest America, Inc.*, 748 F. Supp. 948, 954 (D.R.I. 1990).

mutually exclusive concepts. Thus, as even some of Petitioners' own cited cases illustrate, there need not be an intentional tort in order for purposeful direction or availment to be established in the tort context for jurisdictional purposes.[12]

Moreover, the problems complained of by Petitioners are more imaginary than real. A broad-based, representative survey of personal jurisdiction decisions over the past decade leads to the conclusion that the principles enunciated by this Court are not only understandable but, for the most part, uniformly applied in a manner that typically does not produce anomalous or unjust results. The cases simply illustrate the fact that there are no "talismanic jurisdictional formulas" for resolving personal jurisdiction issues, and the facts of each case must always be evaluated and weighed. *Burger King Corp. v. Rudzewicz*, 471 U.S. at 485. Contrary to Petitioners' contention, however, there is no significant problem with "conflicting results in the lower courts," nor do the cases demonstrate any pervasive "doctrinal disarray" or "existing discord in doctrine." [Petition at 9, 10, 17, 21].

The cases cited by Petitioners to demonstrate the alleged "doctrinal disarray" of which they complain evidence no such phenomenon at all, but rather can fairly be reconciled with this Court's decisions. For example, despite some questionable *dicta* in its opinion, the Court

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[12] *See, e.g., Fidelity State Bank and Trust Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, ___ F. Supp. ___, 1991 WL 116738 (D. Kan. 1991); *Theunissen v. Matthews*, 935 F.2d 1454 (6th Cir. 1991); *Shute v. Carnival Cruise Lines*, 897 F.2d 377 (9th Cir. 1990), *rev'd on other grounds*, 111 S. Ct. 1522 (1991).

in *Simmons Oil Corp. v. Holly Corp.*, 244 Mont. 75, 796 P.2d 189 (1990) recognized and followed appropriate jurisdictional guidelines, including the purposeful availment requirement. The *Simmons* Court simply held that the defendants had "purposefully interjected" themselves into the forum state and had purposefully availed themselves of the benefits and protections of Montana law. 796 P.2d at 197-98. One of the defendants had "engaged in extensive activity directed toward" Montana, and the other defendant had taken "affirmative steps to conduct business affecting Montana." *Id.* at 197, 198. Accordingly, it is not surprising, let alone inconsistent with this Court's pronouncements, that personal jurisdiction was found in that case.

Similarly, personal jurisdiction was found over a law partnership, but not the individual partners, in *Sher v. Johnson*, 911 F.2d 1357 (9th Cir. 1990). That was a legal malpractice action where the defendant/partnership was found to have invoked the benefits and protections of the forum state's laws, by activities including phone calls, letters and trips to the forum state (California), as well as requiring execution of a deed of trust to California real estate. 911 F.2d at 1363-64. Thus, because the partnership had "purposefully directed its activities to California, personal jurisdiction [was] presumptively reasonable." *Id.* at 1364. Respondents Atwood have no quarrel at all with that proposition, since it is consistent with this Court's decisions. *See, e.g., Burger King*, 471 U.S. at 477. Because Petitioners did not, and could not, establish that the Atwood parents purposefully directed any activities to Arizona, however, there clearly is no such presumption here.

Petitioners cite several U.S. District Court cases for the proposition that they incorrectly "compress the doctrines of personal jurisdiction . . . into a single test that looks to the defendant's state of mind and seeks to determine the purposefulness of the forum contact generated by the defendant." [Petition at 19]. Suffice it to say that the jurisdictional principles recognized and followed by those courts, and the holdings of those cases, are totally consistent with this Court's decisions; and they certainly do not evidence the "doctrinal conflicts" alleged by Petitioners. [Petition at 18].

The cases cited by Petitioners in support of their "objective awareness" theory also are inapposite. *Farmers Ins. Ex. v. Portage La Prairie Mut. Ins. Co.*, 907 F.2d 911 (9th Cir. 1990) simply held that the defendant/insurance company "purposefully availed itself of the Montana forum when it contracted to indemnify and defend claims arising there." *Id.* at 914. That ruling was based on the fact that the defendant's "policy coverage extend[ed] into Montana and an insured event resulted in litigation there," and also on the proposition "that personal jurisdiction follows the insured risk." *Id.* at 913, 914. Thus, the insurance company's actions "satisfied the purposeful availment requirement." *Id.* at 913.

In *English & Smith v. Metzger*, 901 F.2d 36 (4th Cir. 1990), the Court found personal jurisdiction in Virginia over a California attorney where, among other activities, defendant initiated contact with plaintiff in Virginia, entered into contracts with plaintiff by virtue of action taken in Virginia, and carried on a continuing relationship with plaintiff in Virginia while the two worked on a case together. *Id.* at 39-40. Under those facts, the Court

properly found "purposeful direction of activities toward the forum" by the defendant. *Id.* at 39.

Waffenschmidt v. Mackay, 763 F.2d 711 (5th Cir. 1985) involved two defendants who "purposefully accepted assets . . . which they knew were subject to an injunction by the district court in Mississippi (the forum state)." *Id.* at 723. Under those facts, jurisdiction was found since the defendants "purposefully engaged in activity outside Mississippi that would have the foreseeable and intended result of dissipating assets subject to marshalling in that forum." *Id.* Thus, the *Waffenschmidt* Court was merely "holding them responsible for the intended consequences which their nonforum activities had on the subject matter of the court's order." *Id.* Again, there is nothing objectionable about that Court's opinion or holding, but they are wholly immaterial here.

The same is true of *O'Neil v. Picillo,* 682 F. Supp. 706 (D.R.I. 1988). That was a governmental action brought pursuant to the Comprehensive Environmental Response Compensation and Liability Act of 1980, 42 U.S.C. §§9601 *et seq.* The non-resident defendants engaged "in heavily regulated activities" and dispatched into the stream of commerce "volatile and dangerous toxic substances," which were consciously and knowingly sent through intermediaries "on a virtual one-way journey to anywhere . . . . " *Id.* at 714 n.1. The defendants were analogized to interstate distributors and manufacturers, and the jurisdictional ruling was strongly influenced by the "inherently dangerous products" which defendants unleashed, and by the nationwide problems involving improper and illegal waste disposal procedures. *Id.* The

facts and holding of the *O'Neil* case simply have no pertinence to this action.

Lichon v. Aceto Chem. Co., Ltd., 182 Ill. App. 3d 672, 538 N.E.2d 613 (1989) involved a manufacturer/seller of a highly toxic chemical, the marketing and transportation of which was not limited by the manufacturer dispatching the substance into the stream of commerce. The *Lichon* Court simply adopted the reasoning of *O'Neil, supra,* and similar cases, which again bear no resemblance to ours. The Atwood parents cannot be fairly analogized to manufacturers of highly toxic chemicals or extremely dangerous products. Fully-grown, adult human beings, unlike inanimate products or waste materials, cannot be constantly monitored or controlled in the real world, particularly by parents who have no legal right or obligations in that regard.

Finally, *Roth v. Marquez*, ___ F.2d ___, 1991 WL 148316 (9th Cir. 1991) does not reflect any doctrinal confusion, nor does it support jurisdiction over Respondents Atwood in this case. The *Roth* Court recognized a three-part test for specific jurisdiction, including a requirement that "the nonresident defendant must have purposefully availed himself of the privilege of conducting activities in the forum by some affirmative act or conduct." 1991 WL 148316, p. 6. The Court also noted in *dicta* that within the tort context, the exercise of jurisdiction may be allowed "over a defendant whose only 'contact' with the forum state is the 'purposeful direction' of a foreign act having effect in the forum state." *Id., quoting Haisten v. Grass Valley Medical Reimbursement Fund*, 784 F.2d 1392, 1397 (9th Cir. 1986). Under that standard, Petitioners here could not establish the necessary threshold predicate for

assertion of jurisdiction over Respondents Atwood in Arizona, since there was no evidence of "purposeful direction" of any acts by them in or towards Arizona.

In sum, even the cases selected by Petitioners to support their argument are not inconsistent with this Court's decisions; and they certainly do not support Petitioners' jurisdictional claim against the Atwood parents here. Moreover, the practical problems noted by Petitioners as allegedly arising from the "[l]ack of coherent doctrine" also are more imaginary than real, particularly as they relate to this case. [Petition at 21]. Petitioners made a conscious, tactical decision to file suit in Arizona not because of any alleged "doctrinal problems" or because of any confusion regarding the purposeful availment requirement or its application, but rather because of the statutory immunity afforded the State of California defendants under California statute. Cal. Gov. Code section 845.8. As noted previously, there were no immunity considerations applicable to the Atwood parents, since Petitioners could have sued them in California and simply chose not to do so.

CONCLUSION

The Petition for Writ of Certiorari should be denied because the Arizona courts properly concluded that personal jurisdiction could not be constitutionally invoked against Respondents Atwood in Arizona. That conclusion, expressly affirmed by the Arizona Court of Appeals and implicitly concurred in by the Arizona Supreme Court, was properly premised on the undisputed facts

that the Atwood parents had no "minimum contacts" with Arizona, did not purposefully direct any activities into or towards Arizona or purposefully avail themselves of any benefits or privileges of Arizona law. Moreover, the factual record did not establish any conduct of the Atwood parents which would somehow provide them with "fair warning" that they might be subject to the jurisdiction of Arizona's courts, or which should have produced any reasonable anticipation of their being haled into court there. Because Petitioners failed to establish any sufficient basis to constitutionally invoke personal jurisdiction over Respondents Atwood in Arizona, they were properly dismissed from the action. For all of these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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No. 91-361

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October Term, 1991

VICKI LYNNE HOSKINSON, et al.,

Petitioners,

vs.

STATE OF CALIFORNIA, et al.,

Respondents.

Petition For Writ Of Certiorari To The Arizona Court Of Appeals, Division Two

PETITIONERS' REPLY BRIEF TO RESPONDENTS ATWOOD'S BRIEF IN OPPOSITION TO THE PETITION FOR CERTIORARI

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I.

PETITIONER'S ARGUMENT REGARDING THE FACTS OF THIS CASE IS INAPPROPRIATE AT THIS PRETRIAL STAGE

Plaintiffs' case was dismissed below following a summary hearing on jurisdiction alone. No witnesses have been heard nor testimony evaluated. Discovery has been limited to the jurisdictional issue. We are here on the pleadings, not a jury's findings.

The case here stands entirely upon the predicate assumptions stated by the Court of Appeals and detailed in the Petition. Under well established Arizona law, that determination is made *de novo* when the question presented is, as here, a mixed question of fact and law. *Tovrea Land & Cattle Co. v. Linsenmeyer,* 100 Ariz. 107, 114, 412 P.2d 47, 51 (1966). The principle of the Tovrea Land & Cattle Co. case is often cited by the Arizona courts and is not subject to the slightest of doubt regarding its applicability here. *See, e.g. McNeel v. McNeel,* ___ Ariz. ___, 1991 WL 171141 (Ariz.App. 1991); *R.A.J. v. L.B.V.,* ___ Ariz. ___, 1991 WL 156591 (Ariz.App. 1991); *State of Arizona v. Galvan-Cardenas,* 165 Ariz. 399, 400, 799 P.2d 19, 20 (App. 2, 1990). Moreover, as we pointed out in our Petition, Arizona law requires that all disputes of fact be resolved in our favor and all inferences be drawn in our favor. *Corbin v. Challange, Inc.,* 151 Ariz. 20, 725 P.2d 727 (App. 1963). In this respect the law in Arizona is the same as the law followed in the federal courts from time immemorial. *See, e.g. Carlin Communication, Inc. v. Southern Dell,* 802 F.2d 1352, 1356 (11th Cir.1906); *Randolph v. Laeisz,* 096 F.2d 964, 969 (5th Cir.1990); *New Burnham Prairie Homes, Inc. v. Burnham,* 910 F.2d 1474, 1477 (7th Cir.1990).

The court below drew its factual assumptions from PLAINTIFF'S STATEMENT OF FACTS UNDER UNIFORM RULE IV(F) which was filed in the trial court prior to the summary disposition. The Statement of Facts has sixty-three paragraphs and twenty-eight pages and was a part of Appellants' Joint Appendix before the Arizona Court of Appeals. Among the facts that support the Court of Appeals' assumption regarding the Atwoods' reasonable expectations of harm are Paragraph Number 31 which concludes that "Mr. Atwood was aware that his son had been in Arizona on at least four occasions during the preceding two months and, in fact, had been in Tucson for several days" and Paragraph Number 36 which deals with Mr. Atwood's admission that he knew his son was repeating old patterns of behavior that had before led to crime. Every factual statement in both the majority and dissenting opinions in the Court of Appeals is supported by facts in the record and inferences reasonably drawn from them and are thus the foundation upon which this untried case must be decided.

Finally, there is no dispute about the fact that Frank Jarvis Atwood was "kicked out of his parents' house" in Los Angeles a few days prior to the abduction in Tucson. PLAINTIFF'S STATEMENT OF FACTS UNDER UNIFORM RULE IV(F), paragraph 43. That was an intentional act on the part of the Atwoods and is the linchpin of the tort case against them. The predicate act of causation is, as we suggest in the questions presented, an intentional one. Given the high degree of awareness of danger to which even Respondents admit (Respondents' Brief in Opposition, pp. 3-4), that intentional act could be expected to cause consequences in some place distant

from the Atwood home. That is our case. That is the intentional failure to act that led to this tragedy.

II.

RESPONDENTS' ASSERTION THAT LAW OF PERSONAL JURISDICTION IS WELL-ESTABLISHED IS BELIED BY THE MOST RECENT SCHOLARSHIP

Petitioners will not be drawn into debate with Respondents about the clarity of personal jurisdiction doctrine. That is a question appropriately dealt with on the merits should this Court grant the Writ. Since the Petition was filed, however, a symposium on the future of personal jurisdiction doctrine has appeared. The symposium is remarkable because it brings together eight of the leading scholars of personal jurisdiction who demonstrate among them the incredible diversity of views about the meaning of current doctrine. Symposium, *The Future of Personal Jurisdiction: A Symposium on* **Burnham v. Superior Court,** 22 Rutgers L. J. 559 (1991) [articles by Professors Brilmayer, Silberman, Stein, Weintraub, Kogan, Twichell, Redish and Maltz).

III.

RESPONDENTS FUNDAMENTALLY MISSTATE PETITIONERS' ARGUMENT ON THE MERITS

Contrary to Respondents' declaration (Respondents' Brief in Opposition, pg. 13), Petitioners do not assert that a showing of reasonable anticipation "satisfies all due process requirements" in a personal jurisdiction case. That is clearly not the law. We do assert that under the *Volkswagen* analysis such a showing satisfies the predicate

requirement upon which the analysis of "traditional notions of fair play and substantial justice" depends. That inquiry was not undertaken in this case because the court below held that Petitioners had not met a threshold requirement of purposeful "direction." Pet. for Cert. at 15.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

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BRIEF IN OPPOSITION IN BEHALF OF THE STATE OF CALIFORNIA RESPONDENTS

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QUESTIONS PRESENTED

1. A California parolee, breaking his parole conditions, traveled through a number of states and killed a child in Arizona. Is there personal jurisdiction over California in an Arizona state court on the claim that California did not use reasonable care in superintending the parolee?

2. Is a state regarded as a "person" under the due process clause for personal jurisdiction purposes?

LIST OF PARTIES

In accordance with Rule 24.2 of the Rules of this Court, the California respondents accept the list of parties as set forth in the petition. The order of the Supreme Court of Arizona denying review of this case, with a dissent, is set forth in the appendix of petitioner's brief as is the unreported minute entry of the trial judge. The opinion under review, *Hoskinson v. State of California*, is now reported at _____ Ariz. _____, 812 P.2d 995 (1991).

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JURISDICTION

The opinion of the Arizona Court of Appeals under review here is dated December 13, 1990. A timely petition for review was filed in the Arizona Supreme Court which denied review on July 9, 1991. The petition for certiorari was timely and the matter is within the jurisdiction of this Court under 28 U.S.C. § 1257 since the judgment of the state Court of Appeals is the highest court of Arizona in which a decision could be had.

CONSTITUTION AND STATUTES INVOLVED

The due process clause of Section One of the Fourteenth Amendment of the Constitution and the California statutes regarding revocation of parole and escaped prisoners, if relevant, are set forth in the petition and pursuant to Rule 24.2 are not included here.

STATEMENT OF THE CASE

The issue in this case is whether there is specific personal jurisdiction over California in Arizona on the theory of inadequate superintendence of a parolee. The parolee illegally left California, was variously in Arizona, New Mexico, Oklahoma and Texas, and committed a murder in Arizona. The murderer has been convicted, sentenced to death, and is not a party here. We respond to a damages claim against California. A claim against the murderer's parents has been dealt with by other counsel.

On May 16, 1984, Frank Atwood was paroled from a five-year sentence at Vacaville, California.[1] Though he was on probation,

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[1] Petitioners here filed a joint appendix in the court below. The facts set forth in the paragraphs above are taken from the affidavits, depositions, and California state records, pages 94 *et seq.*, in volume one of that appendix.

he left California by car, crossed Arizona spending some time in a woods in the vicinity of Tucson (where he apparently sustained himself by scavenging from the garbage of a McDonald's), passed on through New Mexico, and went to join a homosexual companion in Enid, Oklahoma. He then set out to return to California because it was time for a conference with his parole officer. There was apparently a quarrel between Atwood and his homosexual lover in Enid so that the other man felt threatened and reported Atwood's presence to the Enid police. On August 27, 1984, the Enid police notified the California police that Atwood had apparently been in Enid since August 13, 1984. On September 11, the California parole officer received a call from Atwood from someplace to the effect that he had had a welding accident and that his eyes were bandaged.

In the course of returning to California, on September 17, 1984, Atwood murdered an eight-year-old girl in Tucson. On September 20, he was arrested in Texas.

As noted, Atwood was convicted of murder and sentenced to death. The suit for damages against the State of California and its parole authorities followed, the charge being, essentially, negligent superintendence of the parolee. The record is replete with details as to just how the California parole authorities handled the matter, none of which we discuss here because the issue is purely jurisdictional. Suffice it to say that there is no hint in the record that the California authorities ever sent Atwood to Arizona, or in any way caused or encouraged him to be there or in any way "purposefully availed" themselves of Arizona in any respect at all. Atwood was a wandering parole violator.

Plaintiffs brought this action in the Pima County Superior Court, the state trial court in Tucson, Arizona. The trial court

granted defendants' motion to dismiss for want of personal jurisdiction.[2] As noted above, the state Court of Appeals affirmed with a dissent and the Arizona Supreme Court denied review, also with a dissent, so that this petition properly lies to the Arizona Court of Appeals.

REASONS FOR DENYING THE WRIT

I. There Is Neither Conflict Nor Importance.

1. This matter represents an effort, so far unsuccessful, to have a hard case make bad law. The murder was hideous and so there is some straining at the limits on interstate jurisdiction. The dissenting justices in the Arizona Supreme Court suggest that if under existing law the California defendants cannot be compelled "to defend themselves in Arizona," then, "[i]f this is not possible under the current decisions of the United States Supreme Court, then, with all due respect, we suggest that the time may have come for that Court to reconsider the issue." Petition, App. 20. Petitioners, p. 18, also suggest that, if need be, this Court should consider "abandoning . . . altogether" its well-established "purposeful availment" doctrine on the limits of personal jurisdiction.[3]

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[2] The trial court also rested independently on the doctrine of comity as preserved by this Court in *Nevada v. Hall*, discussed at length *infra*. The court below reaffirmed the judgment of the trial court but did not discuss the comity question.

[3] For a parallel law review article by petitioners' counsel here recognizing that "purposeful availment" is "today the doctrine of personal jurisdiction" and urging the "abandonment" of existing law as "the only prudent course," *see* Woods, *Carnival Cruise Lines v. Shute: An Amicus Inquiry Into the Future of "Purposeful Availment,"* 36 Wayne L. Rev. 1393, 1409-10 (1990). As the court below clearly understood, this Court would have to abandon 30 years of doctrine to uphold petitioners here.

The law of personal jurisdiction is not in the state of primeval chaos from which petitioners would rescue it. It is clearly established from *Hanson v. Denckla*, 357 U.S. 235, 78 S. Ct. 1228, 2 L. Ed. 2d 1283 (1958), through *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472, 105 S. Ct. 2174, 2182, 85 L. Ed. 2d 528 (1985), to *Asahi Metal Industry Co., Ltd. v. Superior Court of California, Solano County*, 480 U.S. 102, 112, 107 S. Ct. 1026, 1032, 94 L. Ed. 2d 92 (1987), that personal jurisdiction depends on two elements, one being substantial justice and fair play, and the other being that the defendant must have such "minimum contacts" as to have "purposefully directed" the offending activities at the forum state. This Court has been unanimous on the "purposefully directed" verbal formula, from Chief Justice Warren in *Hanson v. Denckla*, to Justice Brennan in *Burger King*, to both Justice O'Connor and Justice Brennan in *Asahi*. For a good article on what the author terms this "one abiding jurisdictional truth," *see* Stewart, *A New Litany of Personal Jurisdiction*, 60 U. Colo. L. Rev. 5, 6 & n.7 (1989). This is "the sine qua non of amenability," Wilkowitz, *Beyond Burger King: The Federal Interest in Personal Jurisdiction*, 56 Fordham L. Rev. 1, 4 (1987).

There has been a difference within the Court as to the application of this concept in the stream of commerce cases. Justice O'Connor in *Asahi* for four justices believed that there was personal jurisdiction only where there was a substantial connection between the defendant and the forum state which came about "by an action of the defendant purposefully directed toward the

forum State."[4] 480 U.S. at 112, 107 S. Ct. at 1032. Justice Brennan, concurring, believed that in the stream of commerce cases there was purposeful direction "[a]s long as a participant in this process is aware that the final product is being marketed in the forum State." *Id.* at 117, 107 S. Ct. at 1034.

Justice Brennan, and Justice White who concurred with him, clearly saw the *Asahi* situation as different from that in the opinion written by Justice White in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 100 S. Ct. 559, 62 L. Ed. 2d 490 (1980). There the Court had held that there was no personal jurisdiction "on one, isolated occurrence . . . the fortuitous circumstance that a single Audi automobile, sold in New York to New York residents, happened to suffer an accident while passing through Oklahoma." 444 U.S. at 295, 100 S. Ct. at 566. *Woodson* went on to say that foreseeability in the light of the inherent mobility of the automobile was not enough to establish minimum contacts between the forum state and the retailer or distributor of the car; a "mere likelihood that a product will find its way into the forum State" is not enough, rather "the defendant's conduct and connection with the forum State are such that he should reasonably

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[4] Some of the cases in which the opinion of Justice O'Connor has been followed are: *Leonardo Da Vinci's Horse, Inc. v. O'Brien*, 761 F. Supp. 1222, 1226 (E.D. Pa. 1991); *In re Perrier Bottled Water Litigation*, 754 F. Supp. 264, 268 (D. Conn. 1990); *Bond v. Octagon Process, Inc.*, 745 F. Supp. 710, 713 (M.D. Ga. 1990), *aff'd*, 926 F.2d 1573 (11th Cir.), *cert. denied*, 111 S. Ct. 2855 (1991); *Tomashevsky v. Komori Printing Machinery Co., Ltd.*, 715 F. Supp. 1562, 1566 (S.D. Fla. 1989); *Sinatra v. National Enquirer, Inc.*, 854 F.2d 1191, 1195 (9th Cir. 1988); *American Greetings Corp. v. Cohn*, 839 F.2d 1164, 1168 (6th Cir. 1988); *Bohannon v. Honda Motor Co., Ltd.*, 682 F. Supp. 42, 44 (D. Kan. 1988); *Local 670 v. Int'l Union, United Rubber Workers*, 822 F.2d 613, 621 (6th Cir. 1987), *cert. denied*, 484 U.S. 1019 (1988); *First City Nat'l Bank & Trust Co. v. Zuckerman*, 682 F. Supp. 182, 184 (S.D.N.Y. 1987); *Gamco Energy, Inc. v. Frost*, 668 F. Supp. 541, 543 (M.D. La. 1987); and *Dittman v. Code-A-Phone Corp.*, 666 F. Supp. 1269, 1271 (N.D. Ind. 1987).

anticipate being haled into court there." *Id.* at 297, 100 S. Ct. at 567.

Atwood was not an article of commerce, and it strains the matter a little to fit him into the factual context of those cases, but the substance is all the same. The effort of petitioners to distinguish due process in tort and contract cases is vain; *World-Wide Volkswagen* was a tort case. Another clear tort illustration is *Calder v. Jones*, 465 U.S. 783, 104 S. Ct. 1482, 79 L. Ed. 2d 804 (1984), a libel case in California against a Florida publication. Jurisdiction was upheld because "here, the plaintiff is the focus of the activities of the defendants out of which the suit arises." 465 U.S. at 788, 104 S. Ct. at 1486. The mere foreseeability of California circulations was not enough, *id.* at 789, 104 S. Ct. at 1486. Rather, "petitioners are primarily participants in an alleged wrongdoing intentionally directed at a California resident, and jurisdiction over them is proper on that basis." *Id.* at 790, 104 S. Ct. at 1487. We are given no reason why tort defendants should be entitled to less due process than contract defendants.

There was no act by California in respect to Atwood purposefully directed toward Arizona in the formula of Justice O'Connor nor any analogy to "the regular and anticipated flow" of the criterion of Justice Brennan. To the extent that those cases fit at all, this is the isolated occurrence, it is a "fortuitous circumstance" that this episode occurred in Arizona. No matter what construction of the concept of "purposeful availment" in any of this Court's cases or separate opinions, there is no element of "purposeful availment" here.

Petitioners oscillate between a concept of "objective awareness," p. 11 (hitherto unknown to the law of personal jurisdiction), and a claim of "reckless and wanton conduct," p. 14. Since

the "objective awareness" concept has not yet appeared in the law of personal jurisdiction, petitioners seek to import it from another area, governmental immunity, *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982), and *Malley v. Briggs*, 475 U.S. 335, 106 S. Ct. 1092, 89 L. Ed. 2d 271 (1986). Not only do those cases have nothing to do with due process or personal jurisdiction, but there the "objective standard" is used to restrict jurisdiction, narrowing it from what Justice Powell describes in *Harlow* as an earlier, subjective standard. Here petitioners seek to import such a concept (whatever it is in this context) for the exact opposite purpose. The invocation of the words "reckless and wanton conduct" as a talismanic construct of the pleader's art, if allowed could create jurisdiction in any case by simply invoking a verbal formula. The reality of minimum contacts cannot be so lightly avoided.

Petitioners also cite *City of Milwaukee v. Illinois & Michigan*, 451 U.S. 304, 312 n.5, 101 S. Ct. 1784, 1790 n.5, 68 L. Ed. 2d 114 (1981). As that opinion shows, this was originally a federal common law claim in the original jurisdiction of this Court; jurisdiction was discretionarily declined in favor of a district court remedy pursuant to *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493, 91 S. Ct. 1005, 28 L. Ed. 2d 256 (1971); venue was expressly authorized under 28 U.S.C. § 1391(b). None of the special circumstances there exist here.

2. *Nevada v. Hall*, 440 U.S. 410, 99 S. Ct. 1182, 59 L. Ed. 2d 416 (1979), is the first case holding that one state can be sued in the courts of another. That case involved a Nevada motor vehicle in an accident in California. Footnote 24 to that case suggested that there would be some limitations as to the types of

matters subject to interstate suits, limitations which it has not yet been the duty of this Court to define.

However, there has been substantial litigation in the states. All of these cases have involved alleged direct action by the defendant state in the forum state, and even then there have been limitations. *See*, for example, *Guarini v. New York*, 215 N.J. Super. 426, 521 A.2d 1362, *aff'd*, 215 N.J. Super. 293, 521 A.2d 1294 (1986), *cert. denied*, 484 U.S. 817 (1987), in which New Jersey residents sued the State of New York in New Jersey state courts for a determination that the Hudson River islands were under the jurisdiction of New Jersey. The New Jersey court, directing its attention to footnote 24, said, "Plaintiffs, if successful, would clearly interfere with New York's capacity to fulfill its own sovereign responsibility over those two islands in accordance with and as granted by the 1833 compact. Exercise of jurisdiction by this court would thereby pose a 'substantial threat to our constitutional system of cooperative federalism.'" 521 A.2d at 1367.

Other post-*Nevada v. Hall* decisions are *Struebin v. Iowa*, 322 N.W.2d 84 (Iowa), *cert. denied*, 459 U.S. 1087 (1982), jurisdiction taken in Iowa against Illinois concerning a claim of negligence by Illinois in maintaining a bridge which it was obligated by contract to maintain on the Iowa side of the Mississippi River; and *see similarly* on inadequate border warning signs, *Wendt v. Osceola County, Iowa*, 289 N.W.2d 67 (Minn. 1979). Two other traffic cases between the District of Columbia and Virginia are *Biscoe v. Arlington County*, 738 F.2d 1352 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1159 (1985), and *Daughtry v. Arlington County, Virginia*, 490 F. Supp. 307 (D.D.C. 1980). *See also Ehrlich-Bober & Co. v. University of Houston*, 49 N.Y.2d 574, 404 N.E.2d 726, 731 (1980), where jurisdiction was taken in a New York state court because all of the principal activities had "centered in New York."

There are two parolee cases in which a claim of negligent supervision is made and in which the case was allowed to go forward in the forum state without requiring that it be brought in the state of parole. Both of these cases rest entirely on the element of overt personal availment by the paroling state which is so completely missing in the instant case. In *Peterson v. Texas*, 635 P.2d 241 (Colo. App. 1981), the injury was done by a juvenile in Colorado who had been paroled by Texas. The program itself in Colorado was sponsored by the Texas state agency and the "defendant McIntire, who was in charge of the program in Colorado as an agent of the State of Texas," was directly involved in the alleged negligent supervision, 635 P.2d at 242. In *Mianecki v. Second Judicial District Court*, 99 Nev. 93, 658 P.2d 422, *cert. denied*, 464 U.S. 806 (1983), a Wisconsin parolee committed an offense in Nevada and suit was allowed in the latter state. There the Wisconsin Department of Corrections had expressly approved the relocation of the probationer in Nevada; the Nevada court held that the express authorization by Wisconsin of the move to Nevada without adequate investigation of or warning to the place in which the probationer would stay permitted the suit to be brought in Nevada.

In short, in the only two parole cases discovered, the state of parole was made subject to suit in the forum state where the state of parole had purposefully availed itself of the forum state, once by participation under its own supervision in a program in the forum state and the second time by direct authorization to go to the forum state. In the instant case, we have a plain fugitive from justice, breaking his parole, who was not authorized to go anywhere.

In *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. at 291-92, 100 S. Ct. at 564, this Court said that the concept of minimum contacts has two objectives, one to protect defendants against dis-

tant or inconvenient forums, and the other "to ensure that the States through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system." This relates directly to the concept of federalism reserved in footnote 24 of *Nevada v. Hall*. Petitioners seek a "reaching out" into California's administration of its laws.

We make the critical point for certiorari purposes: There is no conflict of decisions.[5] No jurisdiction, state or federal, has yet held that a lawfully released parolee who breaks his parole and wanders off to another state subjects the home state to liability for his conduct in his travels. The only case remotely suggested as a conflict by petitioners is *Roth v. Garcia Marquez*, 942 F.2d 617 (9th Cir. 1991). This is a contract case in which a movie producer in California sued an author in Mexico City and his literary agent in Spain claiming breach of a contract concerning the right to make a film. The jurisdictional question was whether this suit could be brought in California. The Court of Appeals declared that the test for personal jurisdiction was that the nonresident defendant must

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[5] We do not suppose that conflict with a law review article justifies certiorari, but in any case none of the four articles petitioners cite, p. 21, conflict with the court below. Kogan, *A Neo-Federalist Tale of Personal Jurisdiction*, 63 S. Cal. L. Rev. 257, 363 (1990), describes "purposeful availment" as the standard "adopted by the Supreme Court." Seidelson, *A Supreme Court Conclusion And Two Rationales That Defy Comprehension: Asahi Metal Indus. Co., Ltd. v. Superior Court of California*, 53 Brooklyn L. Rev. 563 (1987), is equally critical of both Justice O'Connor's four-Justice opinion in *Asahi* and the eight-Justice portion. Maltz, *Unraveling the Conundrum of the Law of Personal Jurisdiction: A Comment on Asahi Metal Industry Co. v. Superior Court of California*, 1987 Duke L.J. 669, 682, observes that "purposeful availment remains the most important element in almost all personal jurisdiction cases"; the issue is construction of the phrase "purposeful availment," and as we have developed, this case does not qualify under any definition. Perdue, *Personal Jurisdiction and the Beetle in the Box*, 32 B.C.L. Rev. 529, 536 (1991), fully recognizes that the Court from 1958 to 1991 has repeatedly required that the defendant have "purposefully affiliated" with the forum state.

have purposefully availed himself of the privilege of conducting activities in California by some affirmative act or conduct and found that in the context of the negotiations the fact that the film was to be produced in California was enough to give jurisdiction. We perceive no analogy between that case and the case at bar.

Even a court used to drawing fine lines would be hard put to make the distinctions required here if petitioners' position were accepted. If a suit lies in the state court of State B on a claim that State A negligently superintended a parole violator, how about a claim that the state negligently licensed a senile driver, or that it failed to control the Mediterranean fruit fly, or that it negligently failed to arrest the perpetrator of a telephone scam? *Nevada v. Hall* was never intended to put every regulatory or supervisory act of a state without more at issue in another state's courts.

3. The issue is not one of public importance. There are the two "deliberate parolee" cases just cited, but we are cited to no other instance of any suit against a state because of the misdeeds of a wandering parolee. The only such case with which we are acquainted is *Chavez v. Indiana*, 122 Ariz. 560, 596 P.2d 698 (1979), which is analogous in that an unauthorized Indiana parolee committed a crime in Arizona resulting in a suit against Indiana in Arizona. The Arizona Supreme Court ordered dismissal of the complaint because it found no personal jurisdiction over the defendant, exactly as was held here.

It is not enough to say that personal jurisdiction presents an important legal problem. This case, the only one that is here, presents a routine application of well-established principles. The only potential for public importance on these facts would have been if the Arizona courts had adopted the position of petitioners' counsel, *see* footnote 3, and "abandoned" the existing law.

II. The State Is A Person For Personal Jurisdiction Purposes.

Petitioners contend that the state is not a "person" for purposes of raising the defense of want of personal jurisdiction under the Fourteenth Amendment. The principal reliance is on *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 109 S. Ct. 2304, 105 L. Ed. 2d 45 (1989). *Will* is tightly limited to analysis of legislative history as to the intent of the word "person" in the Civil Rights Act and has no bearing beyond that. State "personhood" depends on the statute and other statutes reach other results on the same point. For example, the state is a "person" under Section 16 of the Clayton Act, *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439, 447, 65 S. Ct. 716, 721, 89 L. Ed. 1051 (1945), and for numerous early citations *see United States v. Cooper Corp.*, 312 U.S. 600, 619, and particularly n.6 and attached text, 61 S. Ct. 742, 744, 85 L. Ed. 1071 (1941), *dissent*, and note in the *Cooper* majority opinion at 312 U.S. 604 that the United States is a "juristic person" for many lawsuit purposes. It is a "person" under the New York Civil Practice Act, *Sherwood v. United States*, 112 F.2d 587, 595 (2d Cir. 1940). Other instances in which the state is a "person" are *United States v. Shirey*, 359 U.S. 255, 257-58 n.2, 79 S. Ct. 746, 747-48 n.2, 3 L. Ed. 2d 789 (1959), and *Ohio v. Helvering*, 292 U.S. 360, 370, 54 S. Ct. 725, 727, 78 L. Ed. 1307 (1934).

Without doubt, Congress can authorize "private suits against States or state officials," *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456, 96 S. Ct. 2666, 2671, 49 L. Ed. 2d 614 (1976); the only question under any given statute is whether it did or not.

We need not go into much learning on this topic because the question is foreclosed by *Nevada v. Hall*, which is the pedestal of petitioners' entire case. That decision says that "[a] judgment entered in one State must be respected in another provided that the

first State had jurisdiction over the parties and the subject matter," 440 U.S. at 421, 99 S. Ct. at 1188 (emphasis added). Surely we can have no exercise in futility by which California can be subject to judgment in Arizona and then be free to ignore that judgment when it is sought to be enforced because of want of jurisdiction in Arizona.

In the earlier portion of this memorandum we have cited numerous cases in which the states in the post-*Nevada v. Hall* world have considered whether there was personal jurisdiction over the defendant state and these were not vain exercises. Every state case has accepted the obvious, that state court jurisdiction over another state under *Nevada v. Hall* is limited to instances in which the forum state has personal jurisdiction. If a state is not a "person" for due process purposes, any state could be sued anywhere for anything with no nexus to the forum at all; California could be sued, for example, in the state court in Maine in a matter on which it has no contacts, however slight, on the theory that due process does not extend to states. The reason that governments can litigate in any case is because they are regarded as "persons" for the purpose of being either in (or in this case out) of the courts; *see United States v. Cooper Corp.*, 312 U.S. at 605, 61 S. Ct. at 743.

CONCLUSION

It is respectfully submitted that the petition for certiorari should be denied.

RESPECTFULLY SUBMITTED.

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No. 91-361

In The

Supreme Court of the United States

October Term, 1991

VICKI LYNNE HOSKINSON, et al.,

Petitioners,

vs.

STATE OF CALIFORNIA, et al.,

Respondents.

Petition For Writ Of Certiorari To The Arizona Court Of Appeals, Division Two

PETITIONERS' REPLY TO THE BRIEF IN OPPOSITION IN BEHALF OF THE STATE OF CALIFORNIA, RESPONDENTS

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I.

RESPONDENT STATE OF CALIFORNIA'S BRIEF IN OPPOSITION CONTAINS CRUCIAL FACTUAL ERRORS

Petitioners would be loath to file yet another brief in this case were it not for the substantial errors of fact contained in Respondent State of California's Brief in Opposition. The true facts are not in dispute here and were not disputed below. Indeed, the suggestion that Frank Jarvis Atwood was a wandering parolee returning to California at the time he stopped in Tucson and murdered Vicki Lynne Hoskinson appears for the first time in Respondent's reply brief here, and is just plain false and utterly lacking in foundation in the record. We respond only because the misstatement of fact is critical to the jurisdictional rule applicable to this case.

We urged below, inter alia, that under the rule of *World-Wide Volkswagen Corp. v. Woodsen*, 444 U.S. 286, 100 S.Ct. 559, 62 L.Ed 490 (1980) defendants were subject to jurisdiction in Arizona because they could reasonably have anticipated that when they failed to exercise control over the soon to explode Atwood he would come to Arizona where he had been several times in the preceding months. Obviously, the temporal and physical connections between the failure to act and the event are important. If Frank Atwood was simply a "wandering parolee" as the State of California suggests, the strength of the jurisdictional claim is diminished. But that is clearly untrue. The connection between the predicate acts of recklessness and the events in Arizona is a direct one in terms of both time and distance.

The undisputed truth of the matter is that Frank Atwood was in Defendant Robert McLean's Parole Office in California on September 6, 1984. At that time Robert McLean had a nondiscretionary duty to arrest Frank Atwood under Section 3059 of the California Penal Code. Pet. for Cert. pg. 3. He did not act as he was required by law to act and he set Frank Atwood free. From that time until Frank Atwood was ejected from his parents' home on September 13, following a violent episode apparently caused by freebasing cocaine, Officer McLean purposefully ignored his duty to control Frank Atwood's actions notwithstanding a constantly cascading body of information that would have compelled such action by any reasonable person. PLAINTIFFS' STATEMENT OF FACTS UNDER UNIFORM RULE IV(f), paragraphs 39-41. During that period of time Frank Atwood was in California and subject to control if McLean had chosen to act. But he chose not to act. That willful and wanton indifference to Frank Atwood's potential victims is the predicate act of recklessness on the part of the California defendants. As the Arizona Court of Appeals assumed, that negligence occurred at a time when the defendants "should reasonably have expected" the effects caused in Arizona. Pet. for Cert., App. 4. That reasonable expectation is the basis for plaintiffs' assertion that the defendants could and should have reasonably anticipated the tragic events that in fact occurred in Arizona. See, *World-Wide Volkswagen Corp. v. Woodsen*, 444 U.S. 286, 100 S.Ct. 559, 62 L.Ed 490 (1980); PLAINTIFFS' STATEMENT OF FACTS UNDER UNIFORM RULE IV(f), paragraph 59.

Those are the facts established by the record and the facts before the court below. There is nothing in the record to support the notion that Atwood was "returning to California" when the murder occurred. As the other Respondents acknowledge, BRIEF OF RESPONDENTS JOHN AND ALICE ATWOOD IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI, pp. 3-5, as the discovery in this case shows and as the testimony in the criminal trial of Frank Atwood established, Frank Atwood came to Arizona from California following the failure of the State of California to take him into custody and the subsequent ejection from his parents' home. Respondents should not be allowed to subvert the certiorari process by the last minute creation of a critical factual question when none in fact exists.

II.

RESPONDENTS BRIEF IN OPPOSITION SEEKS TO INJECT INTO THIS CASE AN ISSUE THAT EXPRESSLY WAS NOT DECIDED BY THE COURT BELOW.

The court below expressly declined to decide the comity issue that is discussed in Respondent's Brief in Opposition at Part I.2 pages 7-9. See, Pet. for Cert., App. 9, note 5. Respondents so admit in a footnote. BRIEF IN OPPOSITION, note 2. Accordingly that discussion is not

properly before the Court and Petitioners do not address it.

Respectfully submitted,

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